167-108

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

No. ~~600~~ 267

THE ENTERPRISE MINING COMPANY, APPELLANT,

vs.

THE RICO-ASPEN CONSOLIDATED MINING COMPANY ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

PETITION FILED MAY 2, 1895.
RETURN FILED JUNE 14, 1895.

(15,884.)

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JULY 10, 1895.

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a Pleas and proceedings in the United States circuit court of appeals for the eighth circuit, at the December term, A. D. 1894, of said court, begun and held at the United States court-house, in the city of St. Louis, Missouri, on the first Monday in December, to wit, the third day of December, A. D. 1894, before the Honorable Henry C. Caldwell, the Honorable Walter H. Sanborn, and the Honorable Amos M. Thayer, circuit judges.

Attest:

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk U. S. Circuit Court of Appeals, Eighth Circuit.

Be it remembered that heretofore, to wit, on the tenth day of January, A. D. 1894, a transcript of record in pursuance to an appeal allowed by the circuit court of the United States for the district of Colorado, in the case of The Enterprise Mining Company, appellant, *vs.* The Rico-Aspen Consolidated Mining Company *et al.*, appellees, was filed in the office of the clerk of the United States circuit court of appeals for the eighth circuit; which said transcript is in the words and figures following, to wit:

1 Pleas in the circuit court of the United States in and for the district of Colorado, sitting at Denver.

Be it remembered that heretofore and on to wit: the 3rd day of September, A. D. 1892, came the Rico-Aspen Consolidated Mining Company, a corporation, by Charles J. Hughes, Jr., its solicitor, and filed in said court its bill of complaint, and sued out of and under the seal of said court a subpœna in chancery against the Enterprise Mining Company, a corporation.

And the said bill is in words and figures as follows, to wit:

UNITED STATES OF AMERICA, *District of Colorado,* } *ss:*

Bill in Chancery.

In the United States Circuit Court within and for the District of Colorado.

THE RICO-ASPEN CONSOLIDATED MINING COMPANY, a Corporation, Plaintiff,
vs.
THE ENTERPRISE MINING COMPANY, a Corporation, Defendant.

To the honorable judges of the circuit court of the United States for the district of Colorado:

The Rico-Aspen Consolidated Mining Company, a corporation organized and existing under the laws of the State of Colorado, and a citizen of the State of Colorado, brings this its bill against the

Enterprise Mining Company, a corporation organized and existing under the laws of the State of New Jersey, and a citizen of the State of New Jersey; said plaintiff herein, your orator, alleges and shows to your honors that the matter in dispute herein exceeds, exclusive of interest and costs the sum or value of two thousand dollars, and that this is a controversy between citizens of different States in this, to wit, that the said plaintiff herein is a citizen of the State of Colorado, and the said defendant is a citizen of the State of New Jersey.

You- orator further complaining alleges and shows that it is a corporation organized, existing and doing business, under and by virtue of the laws of the State of Colorado and as such corporation, authorized and empowered, to purchase, hold, occupy and mine lode mining claims within said State of Colorado, and that
2 the said defendant is a corporation organized, existing and doing business under and by virtue of the laws of New Jersey, and carrying on business in the State of Colorado, by virtue of a compliance with the laws of the State of Colorado, governing the carrying on of business in said State by a corporation organized under the laws of another State.

Your orator further complaining alleges that it was on the first day of August, 1892, and long prior thereto the owner in and entitled to the possession of the Vestal Lode mining claim, situate in — mining district, in the county of Rico and State of Colorado; that the said Vestal Lode mining claim, is a lode mining claim, 1,500 feet in length, by 300 feet in width, duly located upon the unoccupied public mineral domain of the United States in full compliance with the local rules and regulations of miners in said mining district, the statutes of the United States and the State of Colorado governing the discovery and location of lode mining claims upon the unoccupied public mineral domain, and that by virtue of divers mesne conveyances from the original locators of said lode, the title thereto has passed into and vested in your orator, and that your orator is now the owner in fee of said Vestal Lode mining claim, the same having been duly entered in the land office for the land district in which said claim is situated, and the purchase price thereof having been duly paid to the United States, and a receiver's receipt, and register's certificate thereof, having heretofore, and prior to said first day of August, A. D. 1892 been issued therefor to your said orator.

And your orator further complaining alleges the fact to be that at all times since the discovery and location of said claim in the year 1879 and from thence hitherto down to the present time, save and except as the same has been unlawfully interfered with by the wrongful and unlawful acts of the said defendant, its agents, servants, attorneys and employés, your orator and your orator's grantors have been in the actual, undisturbed and exclusive possession of said Vestal Lode mining claim; and that at all times hereinafter mentioned, your orator and your orator's grantors were and have been, and now are the owners of said claim, and of all valuable ores and minerals situate and being within the surface boundaries thereof

extended downward vertically into the earth, said minerals and ores being a part and parcel of the said Vestal Lode mining claim.

And your orator further complaining alleges that heretofore and on to wit about the first day of August, A. D. 1892, and as to the exact date thereof your orator not being sufficiently advised cannot state the same, as your orator is informed and believes, by
3 means of certain drifts, levels and other workings run by the said defendant, its agents, servants and employés, from without the surface boundaries extended downward vertically of said Vestal Lode mining claim, the said defendant did secretly, clandestinely and without the knowledge or consent of your orator, wrongfully, fraudulently and unlawfully extend said workings into and under the said lode mining claim of your orator, and within the surface boundaries extended downward vertically thereof, and did secretly and without the knowledge or consent of your orator fraudulently, wrongfully and unlawfully break down, extract and remove therefrom large and valuable quantities of gold and silver bearing ore then and there being the property of your said orator as a part of the said Vestal Lode mining claim, and is now breaking, removing, selling and converting ore from said claim, the property of your said orator to the said defendant's own use, and will unless restrained and enjoined by an injunction issued out of this honorable court as the said defendant threatens to do, still continue to break down, remove, extract, and convert to its own use, other large and valuable quantities of said ore still remaining within the surface boundaries extended downward vertically of said Vestal Lode mining claim, and the property of your said orator to the destruction of your orator's estate therein; the said portion of said Vestal Lode mining claim being only valuable for the mineral therein contained; all of which wrongful acts on the part of the said defendant are to the great loss and irreparable damage and injury of your said orator.

And your orator further complaining alleges that within a short time past, having heard intimations that the said defendant was thus wrongfully mining within the territory of your said orator, and fraudulently and unlawfully breaking down and removing valuable ores therefrom, it caused inquiry as to the fact to be made of the president of said defendant company, who positively assured your said orator and its said officers that the said defendant was doing and had done no work then within the surface boundaries extended downward vertically of said Vestal Lode mining claim, and had neither broken down, nor removed, nor was breaking down or removing any ore therefrom whatever, although as your orator is informed and believes said president of said company then well knew that theretofore the said defendant by its agents, servants and employés, with the full knowledge, and by the procurement of said president, had caused large and valuable quantities of ore, the property of your orator, to be broken down within the surface boundaries extended downward vertically of the said Vestal Lode mining claim, and shipped, sold and converted to the uses of the said
4 defendant, and that for the purpose of deceiving and mis-

leading your orator, and preventing your orator from being informed, and advised of said *said* wilful, deliberate, wrongful and fraudulent trespass upon its said property by the said defendant, the said defendant through its said president, caused to be produced and exhibited to the president of your said orator certain maps which it was falsely claimed and pretended exhibited all the workings then done by the said defendant, and showing that no work was being or had been done within the territory of the said Vestal claim. All of which the said defendant and its said president, when thus exhibiting said map well knew was false and untrue, in failing to show that extensive workings had been made within the said Vestal Lode mining claim, and large stopes of ore broken down and removed therefrom.

And your orator further alleges that only within the last day or two, and by virtue of examination and survey has it learned and known that notwithstanding said false representations and misstatements of said defendant, it was and for a long time past had been mining within the said Vestal territory, and had shipped, removed, sold and converted to its own use therefrom large and valuable quantities of mineral, the property of your orator, and although your orator is not able to state the exact value thereof, yet upon information, it believes and alleges it to be of the value of one hundred and fifty thousand dollars.

And your orator further complaining alleges that within the past few hours, the said defendant by its agents, servants and employés, has driven an opening into the workings made by your orator within and upon its said Vestal Lode mining claim and by force and arms and with armed men driven out and expelled the workmen and employés of your orator, then and there peaceably and lawfully in the possession of said premises, and by means of smudges, smoke and other combustibles and explosives has driven the said workmen and employés of your orator from said workings, and from their workings in and upon the said Vestal Lode mining claim, and taken forcible possession thereof with armed men, and now keeps and holds possession thereof, and threatens so to continue and to take further possession of other workings heretofore made by your said orator's employés and grantors in and upon said Vestal Lode mining claim, and which they had a full and lawful right to make.

Your orator further alleges that for the purpose of enabling them to take said possession and to drive out the employés of your orator therefrom, well knowing the effect and intending the same, the said defendant and its employés caused large quantities of dynamite to be exploded in the immediate vicinity of the workmen of your said orator, without warning them, the result of the concussion being to knock down, bruise, injure and maim said employés, and to endanger their lives, and that the said defendant is continuing to explode such dynamite in the workings and upon the property of your said orator for the purpose of driving out and keeping out the employés of your orator from the workings heretofore made upon its said property by your said orator and its grantors,

and unless restrained therefrom will further continue to encroach upon the rights of your orator, take further possession of its said workings, and cause great danger, and probable loss of life to its employés by means of its wrongful, wicked and malicious use of force, and explosives for that purpose, and hindering and preventing any work being done, in or upon said portion of said Vestal Lode mining claim, and in said workings, by your said orator, and its employés.

And your orator further complaining alleges that it has notified and requested said defendant to cease and desist from said wrongful acts, and violent conduct, and interference with the possession and rights of your said orator, and the mining and taking of said ore, but that said defendant and its employés, wholly fail and refuse so to do, but threaten to and will continue their unlawful acts, as hereinbefore stated, unless enjoined therefrom by an injunction issuing out of this honorable court.

And your orator further alleges upon information and belief that the said defendant company is insolvent, and wholly unable to respond in damages to your orator for the injuries thus wrongfully and unlawfully inflicted, and your orator further complaining alleges that by means of said unlawful and wrongful trespass upon the rights of your said orator in invading its said territory and breaking down and destroying its said workings, and driving out its employés, and filling its said workings with smoke, and exploding said dynamite therein, by means of its extracting, and wrongfully and unlawfully breaking down and removing ore, the property of your orator, from within the surface boundaries extended downward vertically, of said Vestal Lode mining claim, the said defendant is inflicting and has inflicted great and irreparable damage, injury and loss upon your orator, and that your orator has no adequate relief except in a court of equity, where such matters are properly and necessarily cognizable.

And your orator further complaining alleges that by means of said breaking into the workings of your orator, and exploding dynamite therein, and filling the same with fumes and smoke and driving your orator's employés therefrom, and by the concussion
6 knocking down, bruising and injuring the same, the said defendant has been and is now excluding and preventing your orator from exercising its ownership of and doing work in and upon its said Vestal Lode mining claim, and hath damaged your orator in addition to the value of the ore thus wrongfully and unlawfully taken from said claim, in the sum of not less than ten thousand dollars.

Your orator further complaining alleges that in order that your orator may have full and adequate relief herein, it is necessary that the proper order should be entered by your honors herein, compelling and commanding the said defendant, its agents, attorneys, servants and employés to restore and deliver up to your said orator, and its employés said possession by them wrongfully invaded, and the workings, the possession of which has been wrongfully, unlaw-

fully, and by force and fraud taken from your said orator, and its employés by the said defendant its agents, servants and employés.

In consideration whereof and forasmuch as your orator is entirely remediless in the premises, according to the strict rules of the common law, and can only have relief in a court of equity, where matters of this nature are properly cognizable and relievable, to the end therefore that the said defendant may if it can show why your orator should not have the relief herein prayed, and may (but not upon oath, oath being expressly hereby waived) to the best and utmost of its knowledge, remembrance, information and belief, full, true, direct and perfect answer make herein.

May it please your honors to grant unto your orator the most gracious writ of subpœna of the United States of America, to be directed to the said defendant, The Enterprise Mining Company, of New Jersey, thereby commanding it at a certain day, and under a certain penalty therein to be specified, to be and appear before your honors in this honorable court, and then and there to answer all and singular the premises, and stand to, perform and abide such orders and decrees as to your honors may seem meet.

And also that your honors may grant herein a temporary injunction restraining and enjoining said defendant, its agents, servants, attorneys and employés, and all persons claiming to be acting through or under it from entering into or upon either the surface or underground territory of the said Vestal Lode mining claim, or within the surface boundaries extended downward vertically thereof, and from breaking down, extracting or removing therefrom any ore, or from removing therefrom any ore heretofore broken down, and from selling, shipping or removing, or receiving pay for any ore heretofore broken down, within said surface boundaries,
7 extended downward vertically of said Vestal Lode mining claim, wherever the same may be, and also a mandatory injunction, commanding and compelling the said defendants, its agents, servants, attorney and employés, immediately to restore and deliver up to your said orator, its agents, servants and employés the territory and premises of which the wrongful and unlawful possession by force and fraud *have* been taken as herein set forth.

And also restraining and enjoining the said defendant from blasting, shooting or putting off dynamite or in any other manner interfering with your orator's possession, occupation and work in and upon said Vestal Lode mining claim, and from in any manner interfering with your orator's doing work and development thereon, until the further order of this court, and that upon the final he-re-ing hereof said injunction be made perpetual.

Also for an order pending this suit appointing on behalf of your orator inspectors with full right and power of ingress and egress to the openings and workings of said defendant made into the said territory of your orator, that is to say within the surface boundaries extended downward vertically of said Vestal Lode mining claim, and the workings of said defendant leading to and reaching into the same, for the purpose of observing the acts and doings of said defendant in and near the same, and also for an order permitting

your said orator, by a surveyor and assistants to be by your said orator named to enter into and upon all the workings, surface and underground of the said defendant, made into or upon the said Vestal Lode mining claim, or within the surface boundaries extended downward vertically thereof, and of the adjacent workings made by the said defendant, whether in or out of territory belonging to said defendant, in order that said surveyor may make complete and accurate surveys of said premises and workings for your said orator, for use in this litigation, and for the full advice and information of your orator concerning the trespass made by said defendant, the amount of ore removed therefrom, the position of said workings, and other matters connected therewith.

And for such other and further or different relief as to your honors may seem meet and in accordance with equity and good conscience; and thus as in duty bound, your orator will ever pray.

CHARLES J. HUGHES, JR.,
Solicitor for Plaintiff.

8 STATE OF COLORADO, }
County of Arapahoe, } *ss:*

D. H. Moffatt, of lawful age, being first duly sworn, upon his oath deposes and says, that he is president of the plaintiff company, and knows the location of the said Vestal Lode mining claim, and the workings of the plaintiff therein, and has been made familiar with the situation of said mines and with the acts complained of on the part of the plaintiff in the foregoing bill; that he has read the foregoing bill of complaint, and knows the contents thereof, and that the same is true to his best knowledge, information and belief, and that he has obtained his information by means of personal examination of the territory, and by telegrams and letters from persons in charge of said Vestal Lode mining claim, who are all credible persons, and makes this verification because of said knowledge, and his position as president of the said Rico-Aspen Consolidated Mining Company.

DAVID H. MOFFAT.

[SEAL.] Subscribed and sworn to before me by David H. Moffat this second day of September, 1892.

ALBERT SMITH,
Notary Public.

My commission as a notary public will expire May 7th, 1893.

Indorsed: No. 2827. United States circuit court, district of Colorado. The Rico-Aspen Consolidated Mining Company, plaintiff, *vs.* The Enterprise Mining Company, defendant. Bill of complaint. Filed Sep. 3, 1892. Robert Bailey, clerk U. S. circuit court. Chas. J. Hughes, Jr., Denver, Colo., solicitor for plaintiff.

And the said subpœna and marshal's return *is* in words and figures as follows, to wit:

THE UNITED STATES OF AMERICA.

UNITED STATES OF AMERICA, } ss:
District of Colorado, }

The President of the United States of America to the Enterprise Mining Company, a corporation, Greeting:

You and every of you are hereby commanded, that you appear before the judges of the circuit court of the United States of America, for the district of Colorado, at the city of Denver, in said district, on the first Monday in October next (it being the 3rd day of October, A. D. 1892), to answer the bill of complaint of the
9 Rico-Aspen Consolidated Mining Company, a corporation, this day filed in the office of the clerk of said court, in said city of Denver, then and — to receive and abide by such judgment and decree as shall then or thereafter be had upon said bill of complaint, upon pain of judgment being pronounced against you by default, and a decree had and entered accordingly.

To the marshal of the district of Colorado to execute, and make due return.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, and the [SEAL.] seal of the said circuit court, at the city of Denver aforesaid, this 3d day of September, in the year of our Lord one thousand eight hundred and ninety-two, and of the Independence of the United States the 117th year.

ROBERT BAILEY, *Clerk.*

Memorandum.

The above-named defendant is hereby notified that unless it and each of them shall enter its appearance in the office of the clerk of said court, at the city of Denver aforesaid, on or before the day to which the above writ is returnable, the complainant's bill will be taken against it as confessed, and a decree entered accordingly.

ROBERT BAILEY, *Clerk.*

Marshal's Return.

UNITED STATES OF AMERICA, } ss:
District of Colorado, }

DENVER, *September 8th*, 1892.

I have duly executed the within writ, by delivering to George Crawford, secretary of the said The Enterprise Mining Company, personally, a true copy of the within writ, at the place and time as follows, to wit: As to George Crawford on the 8th day of September, A. D. 1892, at Denver, in Arapahoe county.

This writ therefore returned duly executed as the law directs, this 8th day of September, A. D. 1892.

A. H. JONES, *Marshal,*
By J. S. WARRICK,
Deputy Marshal.

10 *Marshal's Fees.*

Service, 1 person, at $2.00 each	$2 00
Mileage, 1 mile, at 6c.; going only	06
Total	$2 06

Indorsed: No. 2827. Circuit court of the United States for the district of Colorado. In chancery. The Rico-Aspen Consolidated Mining Company, a corporation, *vs.* The Enterprise Mining Company, a corporation. Subpœna. Returnable to rule day, first Monday in October, A. D. 1892. Robert Bailey, clerk. Filed this 8th day of September, A. D. 1892. Robert Bailey, clerk. Chas. J. Hughes, Jr., of Denver, compl't's sol'r.

Restraining Order.

UNITED STATES OF AMERICA, } ss:
District of Colorado, }

In the Circuit Court of the United States within and for the District of Colorado.

THE RICO-ASPEN CONSOLIDATED MINING COMPANY, a Corporation, Plaintiff,
vs.
THE ENTERPRISE MINING COMPANY, a Corporation, Defendant.

On reading the sworn bill of complaint in the above-entitled cause, it is ordered that a hearing be had on motion for the injunction and other relief therein before the district judge hereof on Monday the 12th day of September, A. D. 1892, at chambers, in Denver, Colorado, at ten o'clock a. m., and that in the meantime, and until the further order of the court the said defendant, its agents, servants, attorneys and employés and each and every of them shall be and are hereby restrained from entering into or upon the surface or underground territory of the Vestal Lode mining claim or within the surface boundaries extended downward vertically thereof, and from breaking down, extracting or removing therefrom any ore, or from removing therefrom any ore heretofore broken down, and from selling, shipping or removing or receiving any pay for any ore heretofore broken down within said surface boundaries extended downward vertically of said Vestal Lode mining claim, wherever the same may be, and from blasting, shooting or putting off dynamite, or making fires or smoke in and upon said Vestal Lode mining claim.

Notice of said hearing shall be given at once. Complainant shall give bond in the sum of $5,000.00, with condition according
11 to law to be approved by the clerk and thereupon injunction shall issue as here directed.

MOSES HALLETT,
Dist. Judge.

Sept. 3, '92.
2—600

Indorsed. 2827. U. S. circuit court. The Aspen-Rico Consolidated Mining Company, a corporation, *vs.* The Enterprise Mining Company, a corporation. Order for hearing and restraining order. Filed Sept. 3, 1892. Robert Bailey, clerk U. S. circuit court.

UNITED STATES OF AMERICA, } ss:
District of Colorado, }

In the Circuit Court of the United States within and for the District of Colorado.

THE RICO-ASPEN CONSOLIDATED MINING COMPANY }
vs.
THE ENTERPRISE MINING COMPANY, Defendant. }

Upon application of the plaintiff herein it is ordered that within five days from the date hereof the said plaintiff may amend its bill, making additional parties plaintiff thereto, and stating the character and nature of their interest in the said Vestal Lode mining claim.

MOSES HALLETT,
Dist. Judge.

Denver, Colo., Sept. 3, 1892.

Indorsed. 2827. U. S. circuit court. The Rico-Aspen Consolidated Mining Company, a corporation, *vs.* The Enterprise Mining Company, a corporation. Order. Leave for plaintiff to amend bill within 5 days. Filed Sept. 3, 1892. Robert Bailey, clerk U. S. circuit court.

Amended Bill.

UNITED STATES OF AMERICA, } ss:
District of Colorado, }

In the United States Circuit Court within and for the District of Colorado. In Chancery.

THE RICO-ASPEN CONSOLIDATED MINING COMPANY, a Corporation, and David Swickhimer, Laura D. Swickhimer, A. P. Adams, Wash'n S. Green, John Kinkaid, A. O. Hedley, Julius Thompson, and Frank W. Ingersoll, Plaintiffs,
vs.
THE ENTERPRISE MINING COMPANY, a Corporation, Defendant.

12 To the honorable judges of the circuit court of the United States for the district of Colorado:

The Rico-Aspen Consolidated Mining Company a corporation organized and existing under the laws of the State of Colorado, and a citizen of the State of Colorado, and David Swickhimer, Laura D. Swickhimer, A. P. Adams, Washington S. Greene, John Kinkaid, A. O. Headley, Julius Thompson and Frank W. Ingersoll, each and every of whom is a citizen of the State of Colorado, leave of court first having been herein had, bring this their amended bill of com-

plaint against the Enterprise Mining Company, a corporation organized and existing under the laws of the State of New Jersey and a citizen of the State of New Jersey, and said plaintiffs herein, your orators allege and show to your honors that the matter in dispute herein exceeds exclusive of interest and costs the sum or value of two thousand dollars, and that this is a controversy between citizens of different States in this, to wit, that the said plaintiff The Rico-Aspen Consolidated Mining Company is a citizen of the State of Colorado, and that the said plaintiffs, David Swickhimer, Laura D. Swickhimer, A. P. Adams, Washington S. Greene, John Kinkiad, A. O. Headley, Julius Thompson and Frank W. Ingersoll are each of them citizens of the State of Colorado, and that said defendant is a corporation organized and existing under the laws of the State of New Jersey, and is a citizen of said State of New Jersey.

Your orators further complaining allege and show that the plaintiff The Rico-Aspen Consolidated Mining Company, is a corporation organized existing and doing business under and by virtue of the laws of the State of Colorado and as such corporation authorized and empowered to purchase hold occupy and mine lode mining claims within said State of Colorado; and that the other above-named plaintiffs are and each of them is a citizen of the United States and of the State of Colorado and authorized as such to locate hold and own lode mining claims within said State of Colorado, and that the said defendant is a corporation organized existing and doing business under and by virtue of the laws of New Jersey and carrying on business in the State of Colorado by virtue of a compliance with the laws of the State of Colorado governing the carrying on of business in said State by a corporation organized under the laws of another State.

Your orators further complaining allege that the above-named plaintiffs David Swickhimer, Laura D. Swickhimer, A. P. Adams, Washington S. Green, John Kinkaid A. O. Headley, Julius Thompson and Frank W. Ingersoll, were, on the first day of August,
13 A. D. 1892, and long prior thereto the owners in fee of the Vestal Lode mining claim situate in Pioneer mining district in the county of Rico and State of Colorado that the said Vestal Lode mining claim is a lode mining claim, fifteen hundred feet in length by three hundred feet in width, duly located upon the unoccupied public mineral domain of the United States, in full compliance with the local rules and regulations of miners in said mining district, the statutes of the United States and of the State of Colorado governing the discovery and location of lode mining claims upon the unoccupied public mineral domain; and that by virtue of divers mesne conveyances from the original locators of said lode, the present legal title thereto has passed into and vested in said above-named plaintiffs, subject to the rights, possessions and contracts for title thereto held by the above-named plaintiff, The Rico-Aspen Consolidated Mining Company, as hereinafter more fully stated and set forth; and that your said orators above named are now as herein stated, the owners in fee of said Vestal Lode mining

claim, and as herein stated in and entitled to the possession of the said Vestal Lode mining claim.

That heretofore and on to wit the — day of ——, A. D. 18— the said Vestal Lode mining claim was duly entered in the land office for the land district in which said claim is situate and the purchase price thereof having been duly paid to the United States, a receiver's receipt and register's certificate thereof was heretofore and prior to said first day of August A. D. 1892, issued therefor to the above-named plaintiffs holding the legal title thereof as hereinbefore stated; that heretofore, and on to wit about the 9th day of February A. D. 1892, the said above-named your orators other than the said The Rico-Aspen Consolidated Mining Company made and entered into an agreement of sale and lease of said Vestal Lodge mining claim with one A. B. Roeder, under and by virtue of which said lease and agreement of sale he was authorized to and did enter into the lawful and rightful possession of said Vestal Lode mining claim, and that deeds were executed therefor, placed in escrow to be delivered to the said Roeder or his assignee upon the completion of the terms of said agreement and lease, and that in the meantime and during the existence of said lease and contract of sale, said Roeder and his assignees were authorized to and did enter into and upon said Vestal Lode mining claim, and every part thereof.

That thereafter and on to wit the — day of —— A. D. 1892, the said A. B. Roeder for a valuable consideration assigned, transferred and set over to the said plaintiff The Rico-Aspen Consolidated Mining Company, said contract of sale and lease and the
14 right to receive said deeds in conveyance of all interests to be by him received therefrom so that all right, title and interest by the said Roeder held in and to the said property and all right of possession vested in him by said deeds and contract and lease passed to and became legally vested in the said plaintiff, The Rico-Aspen Consolidated Mining Company, which said company has from thence hitherto held and now holds said titles and interests; that the said Roeder and the said Rico-Aspen Consolidated Mining Company have fully kept and performed their undertakings, and made the payments by them to be made under and by virtue of said contract, of sale, lease and deeds and are and have been, since the execution thereof in the lawful and rightful possession of said property working and keeping the same, saving as they have been unlawfully interrupted therein as hereinafter stated.

And your orators further complaining, allege the fact to be that at all times since the discovery and location of said claim in the year A. D. 1879 and from thence hitherto down to the present time, save and except as the same has been unlawfully interfered with by the wrongful and unlawful acts of the said defendant, its agents, servants, attorneys and employés, your orators and your orators' grantors have been in the actual, undisturbed and exclusive possession of said Vestal Lode mining claim as a lode claim duly located upon the unoccupied public mineral domain, of the United States, and by virtue of purchase and entry thereof as hereinbefore stated; and that at all times, hereinafter mentioned your orators and ora-

tors' grantors were and have been and now are the owners of said claim and of all valuable ores and minerals situate and being within the surface boundaries thereof extended downward vertically into the earth; and that said minerals therein thus contained are part and parcel of the said Vestal Lode mining claim.

And your orators further complaining allege that heretofore and on to wit about the first day of August A. D. 1892, as your orators are informed and believe, but as to the exact date thereof your orators are not sufficiently advised as to be able to state the same accurately, as your orators are informed and believe by means of certain drifts, levels and other workings run by the said defendant, its agents, servants, and employés, and from without the surface boundaries extended downward vertically of the said Vestal Lode mining claim the defendant did secretly, clandestinely, and without the knowledge or consent of your said orators or any of them, wrongfully, fraudulently and unlawfully extend its said workings into and under the said lode mining claim of your orators and within the surface boundaries extended downward vertically
15 thereof; and did secretly and without the knowledge or consent of your orators fraudulently wrongfully and unlawfully break down, destroy and remove therefrom large and valuable quantities of gold and silver bearing ore, then and there being the property of your said orators as a part of said Vestal Lode mining claim, and was at the time of the filing of the original bill herein and the issuing of the restraining order herein breaking, removing, selling and converting ore from said claim the property of your said orator to the said defendant's own use and as your orators are now informed and believe have since the issuing of the said order been and now are removing selling and converting ore from said claim the property of your said orators to said defendant's own use; and that said defendant will unless restrained and enjoined by a proper injunction issuing out of this honorable court as it the said defendant now threatens to do, continue to break down, remove extract and convert to its own use other and large and valuable quantities of said gold and silver bearing ore still remaining within the surface boundaries extended downward vertically of said Vestal Lode mining claim, and the property of your said orators, to the destruction and exhaustion of your said orator's estate therein.

That the said portion of the said Vestal Lode mining claim from which said defendant has been and will mine and remove said ore is only valuable for the mineral therein contained, and that all said wrongful acts on the part of said defendant are to the great loss and irreparable damage and injury of your said orators.

And your orators further complaining allege that within a short time past having heard intimations that the said defendant was thus wrongfully mining within the territory of your said orators, and fraudulently and unlawfully breaking down, and removing valuable ores therefrom the said plaintiff, The Rico-Aspen Consolidated Mining Company, caused inquiry as to the fact to be made of one G. W. Crawford, whom at the time it was informed and believed was the president of said defendant company, but whom it is now

informed by the attorney of said company is the secretary thereof, it being also now advised that the president of said company is a non-resident, residing as it is informed and believes in the State of New Jersey or elsewhere in the East; and that upon said inquiry being made said secretary of said defendant company, speaking for said company positively assured the representative and president of the said Rico-Aspen Consolidated Mining Company, one of your said orators and other of its officers, that the said defendant
16 was doing and had done no work within the surface boundaries extended downward vertically of said Vestal Lode mining claim, and had neither broken nor removed any ore therefrom, nor was breaking down or removing any ore therefrom whatever, although as your orators are informed and believe said secretary of said company then well knew that theretofore the said defendant by its agents servants and employés with the full knowledge and by the procurement of said secretary had caused large and valuable quantities of ore, the property of your orators to be broken down within the surface boundaries extended downward vertically of said Vestal Lode mining claim, and shipped and sold and converted the same to the uses of said defendant; and that for the purpose of deceiving and misleading your orators and preventing your orators from being informed and advised of said willful deliberate wrongful and fraudulent trespass upon the said property by said defendant, the said defendant by and through its said secretary caused to be produced and exhibited to the president of the said Rico-Aspen Consolidated Mining Company one of your orators herein certain maps, which it was falsely claimed and pretended exhibited all the workings then done by the said defendant, and showing that no work was being or had been done within the territory of the said Vestal claim or within the surface boundaries thereof extended downward vertically into the earth, all of which the said defendant and its secretary when thus exhibiting said map, well knew was false and untrue in failing to show that extensive workings had been made within the said Vestal Lode mining claim, and large stopes of ore broken drawn and removed therefrom.

And your orators further complaining allege that only within the last day or two, that is to say, the last day or two preceding the filing of the original bill herein, and by virtue of examination and survey have your orators learned and known that notwithstanding said false representations and misstatements of said defendant it was and for a long time past had been mining within the said Vestal territory and had shipped removed sold and converted to its own use therefrom large and valuable quantities of mineral, the property of your said orators, and although your orators are unable to state the exact value thereof yet upon information they believe and allege it to be of the value of one hundred and fifty thousand dollars.

And your orators further complaining allege that within the past few hours immediately preceding the filing of said original bill the said defendant by its agents servants and employés had driven an opening into workings made by the plaintiff The Rico-
17 Aspen Consolidated Mining Company within and upon said

Vestal Lode mining claim and by force *and* arms and with armed men by smoke and fire and explosions of large quantities of dynamite exploded for that purpose, expelled and driven out the workmen and employés of your orators then and there peaceably and lawfully in the possession of said premises and at work, and by means of certain smudges smoke and other combustibles and explosives have driven out the said workmen and employés of said Rico-Aspen Consolidated Mining Company from said workings and from the workings in and upon the said Vestal Lode mining claim; and adjacent property and taken forcible possession thereof with armed men and at the time of filing said original bill and saving as restrained therefrom by restraining order herein issued, occupies and holds possession thereof, and threatens to so continue, and to take possession of other workings heretofore made by your said orators their employés and grantors and to which your said orators are entitled to the possession in and *and* upon said Vestal Lode mining claim.

Your orators further allege that *that* for the purpose of enabling the said defendant and its employés to take said possession, and to drive out the employés of your orators therefrom well knowing the effect and intending the effect thereof the said defendant and its employés caused large quantities of dynamite to be exploded in the immediate vicinity of the workmen of your said orators without warning them of such purpose, and without any right or necessity for so doing, the result of the concussion being to knock down, bruise injure and maim said employés, and to endanger their lives, and to break down and destroy the timbering walls and workings of your said orators; and that the said defendant was at the time of filing said bill continuing to explode such dynamite in the workings and upon the property of your said orators, for the purpose of driving out and keeping out the employés of your orator- from the workings heretofore made upon their property by your said orators and their grantors and have heretofore set fire to and burned to a large extent thereby causing great damage to your orators the timberings in the said workings, and that unless restrained therefrom the said defendant will further continue to encroach upon the rights of your orators, take further possession of their said workings, and cause great danger and loss of life to their employés by means of its wrongful and wicked use of force and explosives for that purpose,

18 and will hinder and prevent any work from being done in or upon said portions of the said Vestal Lode mining claim and in said workings by your said orators and their employés.

And your orators further complaining allege that the said plaintiff, The Rico-Aspen Consolidated Mining Company, has notified and requested said defendant and its employés to cease and desist from said wrongful acts and violent conduct and interference with the possession and rights of your said orators, and of said company and the mining and taking said ore, but that said defendant and its employés wholly failed and refused so to do, and threaten to and will continue their unlawful acts as hereinbefore stated, unless

enjoined therefrom by an injunction issuing out of this honorable court.

And your orators further allege upon information and belief that the said defendant company is insolvent and wholly unable to respond in damages to your orators for the injuries thus wrongfully and unlawfully inflicted; and your orators further complaining allege that by means of said unlawful and wrongful trespass upon the rights of your said orators in invading their said territory and breaking down and destroying their said workings, and driving out their employés and filling their said workings with smoke, and bur-ing their timbering therein and injuring and maiming their employés and exploding said dynamite and other explosives therein, and by means of its extracting and wrongfully and unlawfully breaking down and removing ore the property of your orators from within the surface boundaries extended downward of said Vestal Lode mining claim, the said defendant is inflicting and has inflicted irreparable damage and loss upon your orators, and that your orators have no adequate relief except in a court of equity, wherein such matters are properly and necessarily cognizable.

And your orators further complaining allege that by means of said breaking into the workings of your orators exploding dynamite therein filling the same with fumes and smoke and driving your orator-' employés therefrom by the concussion, knocking down bru-sing and injuring the same and by the building of fires therein by the said defendant, said defendant has been and now is excluding and preventing your orators from exercising their ownership or doing work in and upon their said Vestal Lode mining claim and hath damaged your orators in addition to the value of the ore thus wrongfully and unlawfully taken from said claim in the sum of not less than twenty thousand dollars.

Your orators further complaining allege that in order that your orators may have full and adequate relief herein it is necessary
19 that a proper order should be entered by your honors herein, compelling and commanding the said defendant, its agents attorneys servants and employés to restore and deliver up to your said orators and their employés the said possession by them wrongfully invaded, and the workings the possession of which has been wrongfully and unlawfully by force and fraud taken from your said orators, and their employés by the said defendant, its agents, servants, and employés.

In consideration whereof, and forasmuch as your orators are entirely remediless in the premises according to the strict rules of the common law, and can only have relief in a court of equity where matters of this nature are properly cognizable and relievable, to the end therefore that the said defendant may if it can, show why your orators should not have the relief herein prayed for, and may (but not upon oath, oath being expressly hereby waived) to the best and utmost of its knowledge remembrance, information and belief full true direct and perfect answer make herein, may it please your honors to grant unto your orators the most gracious writ of subpœna of the United States of America to be directed to the said defendant

The Enterprise Mining Company of New Jersey, thereby commanding it at a certain day, and under a certain penalty therein to be specified to be and appear before your honors in this honor-ble court, and then and there answer all and singular the premises and stand to perform and abide such orders and decrees as to your honors may seem meet.

And also that your honors may grant herein a temporary writ of injunction restraining and enjoining said defendant, its agents, servants, attorneys and employés and all persons claiming to be acting through or under it from entering into or upon either the surface or underground territory of said Vestal Lode mining claim, or within the surface boundaries extended downward thereof, and from breaking, destroying or removing therefrom any ore, or from removing therefrom any ore heretofore broken down, and from selling, shipping or removing or receiving pay for any ore heretofore broken down within said surface boundaries extended downward vertically of said Vestal Lode mining claim wherever the same may be and also a mandatory injunction commanding and compelling the said defendant, its agents, servants, attorneys and employés immediately to restore and deliver up to your said orators their agents, servants and attorneys the territory and premises of which the wrongful, and unlawful possession by force and fraud has been taken as herein set forth.

And also restraining and enjoining said defendant from blasting, shooting or putting off dynamite, or in any other manner interfering with your orators' possession and occupation, and work in and upon the said Vestal Lode mining claim, and from in any manner interfering with your orators doing work and development thereon until the further order of this court, and that upon the final hearing hereof said injunction may be made perpetual.

Also for an order pending the suit appointing on behalf of your orators inspectors with full right and power of ingress and egress to the openings and workings of said defendant made into the said territory of your orators, that is to say, within the surface boundaries extended downward vertically of said Vestal Lode mining claim, and the workings of said defendant leading to and reaching into the same for the purpose of observing the acts and doings of said defendant in and near the same, and also for an order permitting your said orators by a surveyor and assistant to be by your said orators named to enter into and upon all the workings of said defendant made into or upon the said Vestal Lode mining claim or within the surface boundaries extended downward vertically thereof, and of the adjacent workings made by the said defendant whether in or out of the territory belonging to said defendant, in order that said surveyor may make complete and accurate surveys of said premises and workings for your said orators for use in this litigation and for the full advise and information of your orators concerning the trespass made by said defendant, the amount of ore removed therefrom, the position of said workings and other matters connected therewith and for such other and further or different

relief as to your honors may seem meet and in accordance with equity and good conscience and thus as in duty bound your orators will ever pray.

C. S. THOMAS,
R. S. MORRISON, &
CHAS. J. HUGHES, JR.,
Solicitors for Plaintiffs.

STATE OF COLORADO, } ss:
County of Arapahoe, }

Fenno T. Osgood of lawful age being first duly sworn upon his oath deposes and says that he is the assistant secretary of the complainant The Rico-Aspen Consolidated Mining Company, and that the president and secretary of said company are now absent from the county; that he has been made familiar with the situation of said mines and the acts complained of on the part of the plaintiff in the foregoing bill; that he has read the foregoing amended bill of complaint and knows the contents thereof and that the same is true to his best knowledge and belief and that he has obtained
21 his information by means of telegrams and letters from persons in charge of the said Vestal Lode mining claim, and affidavits with reference thereto, the same being made by credible persons; that he makes this verification because said knowledge is in his possession as secretary of said Rico-Aspen Consolidated Mining Company, and on account of the absence from the county of the said president and secretary thereof.

FENNO T. OSGOOD.

[SEAL.] Subscribed and sworn to before me this 8th day of September, A. D. 1892.

ALBERT SMITH,
Notary Public.

My commission as a notary public will expire May 7th, 1893.

Indorsed: 2827. In U. S. circuit c't. The Rico-Aspen Con. M. Co. *vs.* The Enterprise M. Co. Amended bill. Filed September 8, 1892. Robert Bailey, clerk U. S. circuit court. Chas. S. Thomas, R. S. Morrison & Chas. J. Hughes, Jr., sol'rs for compl'ts.

UNITED STATES OF AMERICA, } ss:
District of Colorado, }

In the United States Circuit Court within and for the District of Colorado.

THE RICO-ASPEN CONSOLIDATED MINING COMPANY, a Corporation, and David Swickhimer, Laura D. Swickhimer, A. P. Adams, Washington S. Greene, John Kinkaid, A. O. Headley, Julius Thompson, and Frank W. Ingersoll, Plaintiffs,
vs.
THE ENTERPRISE MINING COMPANY, a Corporation, Defendant.

The answer of the Enterprise Mining Company to the bill of complaint of the Rico-Aspen Consolidated Mining Company and to the amended bill of complaint of the above-named complainants.

This defendant, reserving all right of exception to the said bills of complaint, for answer thereto, saith:

That as to whether the complainants, David Swickhimer, Laura D. Swickhimer, A. P. Adams, Washington S. Greene, John Kincaid, A. O. Headley, Julius Thompson and Frank W. Ingersoll, or either of them thereof, were, on the first day of August, 1892, or at any time prior thereto, the owners in fee of the Vestal Lode mining claim, mentioned in said bill of complaint, this defendant has not and cannot obtain sufficient knowledge or information upon which to base a belief, and therefore denies the same. This defendant denies that the said Vestal Lode mining claim was duly located upon the unoccupied public mineral domain of the United States, in compliance with the local rules and regulations of miners in said mining district, and statutes of the United States and the State of Colorado, and avers upon information and belief, that said Vestal mining claim was not located in compliance with the laws of the United States regulating the location of lode mining claims upon the public mineral domain of the United States. And this defendant further says, that it does not know, and has never been informed, save by the complainants' bill, whether the legal title of said Vestal claim has passed into or vested in the complainants herein, or any thereof, and therefore denies that the complainants, or any of them, are the owners in fee of said Vestal Lode mining claim, subject to the rights, possessions and contracts for title as alleged in said amended bill, or at all, and denies that the complainants, or any thereof, are entitled to the possession of the said Vestal Lode mining claim.

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The defendant denies that said Vestal Lode mining claim was duly entered in the land office of the land district, in which said claim is situated. This defendant admits that on, to wit, the — day of ——, 189–, the said Vestal mining claim was entered in the land office of the land district in which said claim is situated and that the purchase price thereof was paid to the United States, and

that a receiver's receipt or register's certificate thereof was issued therefor prior to August 1st, 1892, but as to whether such receiver's receipt or register's certificate was issued to the plaintiffs named in the amended bill of complaint herein, or to any thereof, this defendant has not sufficient knowledge or information upon which to base a belief, and demands strict proof thereof, but this defendant denies that said Vestal Lode mining claim was duly or lawfully entered in such land office, and avers that said receiver's receipt or register's certificate had no validity, and that the issuance thereof was obtained by fraud, and by false and deceitful representations made and proofs submitted to the officers of said land office, and this defendant alleges that prior to the issuance of said receiver's receipt or register's certificate, no vein or lode of quartz or other rock in place, bearing gold, silver, or other valuable deposits, had been discovered within the limits of the said Vestal mining claim.

This defendant further says that as to whether on or about February 9th, 1892, the complainants other than the Rico-Aspen Consolidated Mining Company, entered into an agreement of
23 sale and lease of said Vestal Lode mining claim, with one A. B. Roeder, under and by virtue of which said agreement and sale or lease, he was authorized to, and did enter into the possession of said mining claim, and as to whether deeds were executed therefor, and placed in escrow to be delivered to said Roeder or his assignees, this defendant has never been informed save by the complainants' amended bill, and require- strict proof thereof, but this defendant denies that under or by virtue of any lease or contract from any of the plaintiffs or otherwise, the said Roeder or his assignees, were authorized to enter into or upon that portion of said Vestal Lode mining claim embracing or containing the Jumbo No. 2 vein, which vein extends in a northeasterly and southwesterly direction through and across the westerly end of said Vestal Lode mining claim. This defendant says that as to whether the said Roeder for a valuable consideration or otherwise, transferred or set over to the Rico-Aspen Consolidated Mining Company, said alleged contract of sale or lease, and the right to receive deeds in conveyance of all or any interests to be by him received therefrom so that all right, title or interest by the said Roeder held in or to said property or any part thereof, and that all or any right of possession vested in him by said deeds or contract or lease passed to and become legally or otherwise vested in the Rico-Aspen Consolidated Mining Company, or as to whether said company has at any time hitherto or now holds said title or interest, or any thereof, this defendant has not sufficient knowledge or information upon which to base a belief, and therefore denies the same, and demands strict proof thereof.

As to whether said Roeder and the said Rico-Aspen Consolidated Mining Company, or either thereof, have fully or at all kept and performed their undertakings, or made the payments by them to be made by virtue of or under said contract of sale, lease and deeds, or either thereof, and are or have been since the execution thereof, or at all, in the lawful and rightful possession of said property, or

any thereof, this defendant has not sufficient knowledge upon which to base a belief, and therefore denies the same, and demands strict proof thereof, and this defendant denies that the said Roeder, or the said plaintiff company, or either thereof, has been unlawfully interrupted in the possession, working or keeping of said Vestal Lode mining claim or any part thereof.

This defendant denies that the plaintiffs, or any thereof, have at any time save and except as they have wrongfully and unlawfully taken possession of the Jumbo No. 2 vein of this defendant, as hereinafter set out, been in the actual or undisturbed or exclusive possession of that portion of the said Vestal Lode mining claim
24 which lies within the boundary lines of the Jumbo No. 2 Lode mining claim of this defendant, and this defendant denies that at any time the plaintiffs or any thereof, or that the grantors of the plaintiffs or any thereof, have been at any time or now are the owners of that portion of said Vestal mining claim which lies within the boundary lines of the Jumbo No. 2 Lode mining claim, and denies that the plaintiffs or their grantors or any thereof, have at any time been the owners of the ores or minerals within the aforesaid Jumbo No. 2 vein where the same intersects and crosses in a northeasterly and southwesterly direction the premises claimed by the plaintiffs as a part of said Vestal Lode mining claim.

This defendant denies that it has at any time fraudulently or wrongfully or unlawfully broken down, destroyed or removed from within the surface boundaries, extended downward vertically, of the said Vestal Lode mining claim large and valuable quantities of gold and silver ore, or any quantity whatever of gold or silver bearing ore being the property of the complainants, or any thereof, as a part of said Vestal Lode mining claim, or otherwise or at all, and this defendant denies that it has before or since the issuance of the restraining order referred to in the amended bill of complaint, removed, sold or converted any ore being the property of the complainants or any of them, and denies that it has threatened to or will break down or remove or extract or convert to its own use or otherwise, any ore or other property of the complainants or any thereof, and this defendant denies that by any acts, wrongfully or otherwise, it has done or caused any loss or damage or injury to complainants or either of them.

The defendant further denies that its secretary, George Crawford who is the same person mentioned in the amended bill of complaint, within a short time prior to the filing of the original bill or the amended bill of complaint herein, assured the representative or president of the complainant company, or other of its officers, that the defendant was doing and had done no work within the surface boundaries of said Vestal Lode mining claim, and denies that the said Crawford shortly before the filing of said original bill assured any officer or representative of the complainant company, that the defendant has neither broken nor removed any ore therefrom, nor was breaking down or removing ore therefrom, but this defendant avers the truth to be, that, prior to 5th day

of August, 1892, no ore had been broken down or removed by the defendant company from any portion of the premises claimed by the complainants, or either thereof, as a portion of said Vestal Lode mining claim, or claimed to be within the said lines of said Vestal claim, extended downward vertically, and this defendant
25 says that prior to said August 5th, the said Crawford did state to the president of the complainant company that no mining had been done by the defendant within the premises claimed by the complainant company as the said Vestal mining claim, and that said statement so made by the said Crawford, was true, and that at the time such statements were made, and for a considerable period thereafter, no mining had been done by the defendant within any portion of the premises claimed by the complainant company as a part of the Vestal mining claim, and no ore had been broken or removed therefrom.

This defendant denies that any statement was made by the said Crawford to any representative of the complainant company subsequent to August 5th, 1892, that defendant had not extended its mine workings within the lines claimed by the complainant company as the boundary lines of said Vestal mining claim.

Defendant admits that prior to the commencement of this suit, it exhibited to the president of the complainant company a certain map; but denies that said map was produced or exhibited for the purpose of deceiving or misleading the complainants, or either thereof, or of preventing them, or either of them, being informed or advised of any trespass by defendant upon any property of the complainants or either thereof, and denies that it claimed or pretended that said map or any map exhibited of the workings as then done by the defendant, or that the same showed that any work was being or had been done within the territory of said Vestal claim.

And the defendant avers that said map was exhibited by the defendant through its said secretary on the 19th day of August last, and it was then and there clearly stated to the representatives of the complainant company then present, that said map only showed the workings made by the defendant company up to the time that said map was prepared from surveys made for the defendant some time prior to August 5th, 1892. And defendant says that said map truly and correctly represented the extent of its workings at the time such survey was made.

Defendant denies that it has at any time mined or shipped or removed or sold or converted to its own use, or otherwise, large and valuable quantities of minerals from the territory of the complainants or either thereof or any mineral whatsoever being the property of the complainants or either thereof, and defendant denies that it has mined, shipped, removed, sold or converted to its
26 own use or otherwise, ore of the value of $150,000, from within the territory alleged in said bill of complaint to be within the boundary lines of said Vestal mining claim, and to be the property of the complainants or some thereof.

And defendant avers that all the ore by it mined within the premises pretended in the original and amended bills of complaint

herein to be the property of the complainants as a portion of the Vestal Lode mining claim, does not exceed in value the sum of $10,000.

Defendant admits that it has driven and opened into workings made by the complainant company within the premises claimed by such complainant company, but denies that by force and arms or with armed men or by smoke, or fire, or explosions of large quantities of dynamite exploded for that purpose, it has exploded or driven the workmen or employés of the complainants or either thereof then and there peacefully and lawfully in the possession of the premises, or that it has at any time taken forcible possession of any of the workings of the complainant company, and denies that it threatens to keep or hold possession of any workings of the complainant company upon or within any of the premises belonging to the complainants, or either thereof, or to the possession of which the complainants or either of them are entitled within said Vestal Lode mining claim or elsewhere.

Defendant denies that for the purpose of enabling it to take possession of any workings of the complainant company upon or within any of the premises belonging to the complainants or either thereof, or for any other unlawful purpose, this defendant caused large quantities of dynamite or any other explosive, to be exploded in the vicinity of the complainants' workmen without warning them thereof, or without any right or necessity for so doing, and defendant avers that the only explosions made or caused to be made by it were of explosives generally in use in the usual prosecution of mining operations, and that all explosions made or caused to be made by the defendant company were made in the ordinary and usual prosecution of its mining operations, and were the explosion of blasts necessarily and properly made by the defendant in the carrying on of the work of developing the lands and mining promises belonging to and in the possession of the defendant, and to the peaceable and exclusive possession of which the defendant was rightfully entitled.

Defendant denies that at the time of the filing of the original bill herein, or at any other time, it so exploded dynamite or other explosives in any of the workings, or any of the property
27 of the complainants, or either thereof, for the purpose of driving out or keeping out the employés of the complainants, or any thereof, from any workings made by the complainants or either thereof upon any of their property, or from any workings made by grantors of any of the complainants, and denies that it has set fire to or burned any timberings in any such workings.

And defendant denies that by doing any of the acts or things alleged in said amended bill to have been done by defendant, the defendant has through its employés or otherwise done or caused the complainants, or either thereof, any damage or injury whatsoever.

Defendant denies that it is insolvent or unable to respond in damages to the complaints or either thereof, for the pretended injuries complained of by the plaintiffs; but defendant avers that it is the owner of mining premises situate on Newman hill near the

town of Rico, in the State of Colorado, of the actual value of more than $2,500,000, which premises are wholly unincumbered and free from any lien, and for which mining premises the defendant's grantor within the past eighteen months paid more than the sum of $1,500,000.

And this defendant, upon information and belief, avers that at the time of the verification of the original bill, and the amended bill herein, by the president of the complainant company, it was well known to such president of the complainant company that the mining premises of this defendant were of great value and wholly unincumbered.

And this defendant denies that it has trespassed upon the rights of the complainants or either thereof, or has invaded any territory or premises belonging to or being the property in or to the possession of which the complainants, or either of them, are entitled, and denies that it has in any respect injured or damaged the complainants, or either thereof.

And the defendant further answering said original bill and amended bill of complaint, says, that on the 25th day of July, 1887, Charles Newman, Matthew T. Chestnut and William L. Stephens, all of whom were native-born citizens of the United States, entered upon a portion of the unoccupied mineral domain of the United States, lying upon Newman hill in Pioneer mining district in the county of Dolores and State of Colorado, and for the purpose of availing themselves of the rights conferred by the mining statutes of the United States and in full compliance therewith and with the laws of the State of Colorado and with the rules and regulations of said mining district, located and claimed a certain mining
28 tunnel site called the "Group tunnel site," upon which they then posted in a conspicuous position, a notice in writing, wherein they set out, among other things, the names of said locators, the name of said tunnel and tunnel site, to wit: the "Group tunnel," the actual and proposed course of such tunnel, the height and width thereof and the said date of location thereof. That said locators claimed and located said tunnel site and tunnel for the discovery of mines and with the purpose of acquiring by means of the location and excavation of said tunnel along the proposed course thereof, the right of possession of all veins or lodes within 3,000 feet from the face of such tunnel on the line thereof, not previously known to exist, discovered in such tunnel, to the same extent as if discovered from the surface.

That thereupon and immediately thereafter said Newman and his said locators began the actual work of excavating said tunnel and at the same time marked out and established the line of said tunnel site and tunnel by causing the same to be surveyed in a straight line for a distance of 3,000 feet from the said face of said tunnel where said notice was posted and caused such line to be plainly marked and established for said distance upon the surface of the earth by posts firmly set in the ground at intervals of about one hundred feet and by marking said posts so that the same plainly showed them to mark the line of said tunnel site and tunnel; and

thereupon the said Newman and his colocators caused a duplicate of said certificate of their location of said tunnel to be duly recorded in the office of the county clerk of said county, with the sworn statements of said locators thereto attached, in which was set out, among other things, the name of said tunnel, the date of the commencement of the actual work of excavation thereof, the date on which the same was located and the intention of the locators thereof to prosecute the same for the purpose of prospecting for discovering and working all lodes, veins, ledges and deposits of minerals along the line of said tunnel, and in which was also set out the amount expended up to that time in running said tunnel.

That immediately after the location of said tunnel site, and, to wit, on the 26th day of July, 1892, the said colocators and claimants commenced to run and excavate a tunnel from said point of location and where said discovery notice was posted and thereafter continuously prosecuted such tunnel through the earth and rock along the line of said tunnel site until on or about August 1st, 1891, at which time they had run a tunnel along the said location a distance of more than 1,500 feet and which tunnel was excavated to a width of four feet and to a height of six feet in the clear. Defendant
29 says that at the time of the location survey and record of said Group tunnel and the commencement of the excavation thereof and for more than two months thereafter, no vein, lode, ledge or mineral deposit had been discovered or was known to exist on or crossing the line of said Group tunnel; that no vein or lode of any character whatsoever had there-fore been discovered within the premises referred to in the bills of complaint herein as lying within the boundary lines of the Vestal mining claim, or was located or claimed or in the possession of or claimed to be in the possession of any person whatsoever until long after the location of said tunnel site and the excavation of said tunnel; and that at the time of the location of said tunnel site and tunnel the premises which are alleged in the bills of complaint to be within said Vestal Lode mining claim were wholly unoccupied and unclaimed by any person whatever and were a portion of the public mineral domain of the United States but subject however to the right of the locators and owners of said tunnel site, or their grantees, to the possession of such veins or lodes as should be discovered in said tunnel and by the complainants as said Vestal Lode mining claim.

That prior to and for a long time after the location record of said tunnel site and the commencement of the work of actual excavation thereof, no vein or lode bearing gold or silver or other metal had been discovered or was claimed to have been discovered at any point within the premises referred to in the bills of complaint herein as the Vestal mining claim and at and for a long time subsequent to time of the location of said tunnel site, no vein or lode was known to exist within said premises.

That long subsequent to the location and recording of said tunnel site and long after the line thereof had been surveyed, marked and established, and long after the actual excavation thereof had been commenced and when the same had been excavated and run to a

town of Rico, in the State of Colorado, of the actual value of more than $2,500,000, which premises are wholly unincumbered and free from any lien, and for which mining premises the defendant's grantor within the past eighteen months paid more than the sum of $1,500,000.

And this defendant, upon information and belief, avers that at the time of the verification of the original bill, and the amended bill herein, by the president of the complainant company, it was well known to such president of the complainant company that the mining premises of this defendant were of great value and wholly unincumbered.

And this defendant denies that it has trespassed upon the rights of the complainants or either thereof, or has invaded any territory or premises belonging to or being the property in or to the possession of which the complainants, or either of them, are entitled, and denies that it has in any respect injured or damaged the complainants, or either thereof.

And the defendant further answering said original bill and amended bill of complaint, says, that on the 25th day of July, 1887, Charles Newman, Matthew T. Chestnut and William L. Stephens, all of whom were native-born citizens of the United States, entered upon a portion of the unoccupied mineral domain of the United States, lying upon Newman hill in Pioneer mining district in the county of Dolores and State of Colorado, and for the purpose of availing themselves of the rights conferred by the mining statutes of the United States and in full compliance therewith and with the laws of the State of Colorado and with the rules and regulations of said mining district, located and claimed a certain mining
28 tunnel site called the "Group tunnel site," upon which they then posted in a conspicuous position, a notice in writing, wherein they set out, among other things, the names of said locators, the name of said tunnel and tunnel site, to wit: the "Group tunnel," the actual and proposed course of such tunnel, the height and width thereof and the said date of location thereof. That said locators claimed and located said tunnel site and tunnel for the discovery of mines and with the purpose of acquiring by means of the location and excavation of said tunnel along the proposed course thereof, the right of possession of all veins or lodes within 3,000 feet from the face of such tunnel on the line thereof, not previously known to exist, discovered in such tunnel, to the same extent as if discovered from the surface.

That thereupon and immediately thereafter said Newman and his said locators began the actual work of excavating said tunnel and at the same time marked out and established the line of said tunnel site and tunnel by causing the same to be surveyed in a straight line for a distance of 3,000 feet from the said face of said tunnel where said notice was posted and caused such line to be plainly marked and established for said distance upon the surface of the earth by posts firmly set in the ground at intervals of about one hundred feet and by marking said posts so that the same plainly showed them to mark the line of said tunnel site and tunnel; and

thereupon the said Newman and his colocators caused a duplicate of said certificate of their location of said tunnel to be duly recorded in the office of the county clerk of said county, with the sworn statements of said locators thereto attached, in which was set out, among other things, the name of said tunnel, the date of the commencement of the actual work of excavation thereof, the date on which the same was located and the intention of the locators thereof to prosecute the same for the purpose of prospecting for discovering and working all lodes, veins, ledges and deposits of minerals along the line of said tunnel, and in which was also set out the amount expended up to that time in running said tunnel.

That immediately after the location of said tunnel site, and, to wit, on the 26th day of July, 1892, the said colocators and claimants commenced to run and excavate a tunnel from said point of location and where said discovery notice was posted and thereafter continuously prosecuted such tunnel through the earth and rock along the line of said tunnel site until on or about August 1st, 1891, at which time they had run a tunnel along the said location a distance of more than 1,500 feet and which tunnel was excavated to a width of four feet and to a height of six feet in the clear. Defendant
29 says that at the time of the location survey and record of said Group tunnel and the commencement of the excavation thereof and for more than two months thereafter, no vein, lode, ledge or mineral deposit had been discovered or was known to exist on or crossing the line of said Group tunnel; that no vein or lode of any character whatsoever had there-fore been discovered within the premises referred to in the bills of complaint herein as lying within the boundary lines of the Vestal mining claim, or was located or claimed or in the possession of or claimed to be in the possession of any person whatsoever until long after the location of said tunnel site and the excavation of said tunnel; and that at the time of the location of said tunnel site and tunnel the premises which are alleged in the bills of complaint to be within said Vestal Lode mining claim were wholly unoccupied and unclaimed by any person whatever and were a portion of the public mineral domain of the United States but subject however to the right of the locators and owners of said tunnel site, or their grantees, to the possession of such veins or lodes as should be discovered in said tunnel and by the complainants as said Vestal Lode mining claim.

That prior to and for a long time after the location record of said tunnel site and the commencement of the work of actual excavation thereof, no vein or lode bearing gold or silver or other metal had been discovered or was claimed to have been discovered at any point within the premises referred to in the bills of complaint herein as the Vestal mining claim and at and for a long time subsequent to time of the location of said tunnel site, no vein or lode was known to exist within said premises.

That long subsequent to the location and recording of said tunnel site and long after the line thereof had been surveyed, marked and established, and long after the actual excavation thereof had been commenced and when the same had been excavated and run to a

distance of several hundred feet from portal thereof and when and at a time when the same was being actually excavated for the discovery of veins or lodes not theretofore known to exist, one A. E. Arms entered upon some portion of the premises within the territory claimed by the complainants as a part of the Vestal Lode mining claim and thereupon and on the 3rd day of April, 1888, caused a notice to be recorded in the office of the county clerk of said county, by which notice said Arms claimed and stated that by right of discovery and location on the 2nd day of April, 1888, and by virtue of and in compliance with the mining act of Congress he claimed 1,500 feet in length along the Vestal lode, with 150 feet on each side thereof and this defendant, upon information and belief, says that the premises mentioned and claimed by said Arms and described in said location certificate, are the same premises of which the complainants, in their bills of complaint herein, claim to be the owners and entitled to the possession; but defendant, upon information and belief, avers that neither the said Arms nor any other person had theretofore nor at any time prior to the alleged entry of said Vestal mining claim in the United States Land Office, alleged in the complaint, found, discovered or located within the boundary line of such mining claim any vein or lode bearing gold, silver or any other metal.

And defendant, upon information and belief, alleges that at the time of said pretended location of said Vestal mining claim, or at any time, until long after the discovery by this defendant of the Jumbo No. 2 vein or lode, as hereinafter set out, said Arms or the complainant- or either thereof, or their grantors, had not found or discovered within said Vestal mining claim, any vein or lode of quartz or other rock in place bearing gold or silver or any other metal, or sunk a shaft upon any lode therein, to a depth of ten feet from the lowest part of the vein thereof at the surface; or excavated or run any open cut, cross-cut or tunnel cutting any vein, or lode at a depth of ten feet below the surface, or excavated an adit ten feet in and along any lode within said premises.

And defendant alleges that in the month of September, 1891, the said Newman and his said colocators who were still the owners of and in possession of said Group tunnel site had by an outlay of more than $17,000, extended and run said tunnel to a point more than 1,500 feet from the face thereof and had therein and thereby cut and disclosed veins or lodes the existence of which were not known previous to the location of such tunnel and which veins or lodes were gold and silver bearing veins not having an apex or cropping at the surface of the earth, but which were "blind" lodes having their tops in solid rock in place, at a great depth beneath the surface of the earth; to wit: at a depth of more than 300 feet below the surface, and said owners of said tunnel site were then engaged in the continuous extension of said tunnel along and on the line of said tunnel site with the design and for the purpose of cutting therein other lodes not previously known to exist, or not known to exist prior to the said location of said tunnel.

That in or about said month of September, 1891, George Craw-

ford, the immediate grantor of this defendant, purchased of said Newman and his co-owners their said tunnel site and tunnel
31 with all their rights and privileges therein and thereunder, and paid therefor the sum of $250,000, in consideration whereof the said Newman and his co-owners by divers mesne conveyances granted and conveyed said tunnel site and tunnel with all the rights, privileges and franchises thereunto incident, appendant or appurtenant. And thereupon said Crawford by certain mesne conveyances, and for a large and valuable consideration by him received from this defendant likewise granted and conveyed said tunnel site and tunnel to this defendant, with all the rights, privileges and franchises thereunto incident, or appurtenant, and this defendant, thereupon became the lawful owner thereof and thereafter actively and continuously prosecuted and extended said tunnel into the earth for the purpose and with the design of cutting and discovering on the line thereof veins or lodes which prior to the location of said tunnel July 25th, 1887, had not been known to exist.

That from the time of the commencement of the actual work of excavation of said tunnel on the 25th day of July, 1887, said tunnel has been excavated and run continuously by this defendant or its grantors, and this defendant or its grantors have not failed at any time for the period of six months to prosecute work on said tunnel, but that this defendant and its grantors have in all respects complied with the provision of the statutes of the United States and of the State of Colorado, relating to the location, possession and ownership of tunnel sites and tunnels, run for the discovery of mines, and with the local rules and regulations of miners in said mining districts; and that this defendant as the owner and in possession of said tunnel, has ever since on or about the first day of January, 1892, been entitled to and had the right of possession of all veins or lodes within three thousand feet from the face of such tunnel on the line thereof not previously known to exist, which should be discovered in such tunnel, to the same extent as if discovered from the surface, and for a distance of 1,500 feet along such veins or lodes.

That thereafter and on, to wit, the 15th day of June, 1892, this defendant while running and excavating said Group tunnel for the purpose and with the design of discovering veins or lodes not known to exist prior to the aforesaid date of the location of said tunnel, cut and disclosed in said tunnel and on the line thereof and tunnel site and at a distance of 1,920 feet from the face thereof a vein or lode of quartz in place bearing gold and silver in such quantity that the same could be profitably worked and mined and which vein or lode is a "blind" vein and does not appear at the surface of the earth but has its top or apex in solid rock in place at a depth of more than 300 feet below the surface, and which
32 vein extends in its course across said tunnel in a northeasterly and southwesterly direction and which vein was not prior to the location of and commencement of the excavation of said tunnel known to exist and which vein had not prior to about the 1st day of August, 1891, been known to exist, or been found or discovered at any

point in its course or length, at which time said vein was discovered by the defendant in workings within the Jumbo mining claim owned by and in the possession of defendant.

That upon the cutting and discovery of the said vein in said Group tunnel, defendant duly located and claimed said vein and the possession thereof as and by the name of the Jumbo No. 2 vein, for a distance of 1,500 feet, to wit, 54 feet running north, 54° 30′ E. in said tunnel, from the point of discovery and 1,446 feet running S. 54° 30′ W. from said point of discovery, with 150 feet on the northwesterly side of the middle of said vein at the surface and 150 feet on the southeasterly side of the middle of said vein at the surface and thereupon defendant on the 15th day of June, 1892, upon the surface of the earth and on the center line of said tunnel and at a point where the said vein would if continued to the surface, have its top or apex, placed a notice of its discovery and location of said vein for the distance of 1,500 feet along its course with 150 feet on each side of the center of said vein, 54 feet being claimed along said vein running north 54° 30′ E. from the point where said notice was posted at the surface and 1,446 feet being claimed along said vein running south 54° 30′ W. from said point.

And thereupon defendant caused the boundaries of said mining claim and location to be duly marked and established at the surface by posts set in the ground, one at each corner and one at the middle of each side boundary line thereof and caused said posts to be marked so as to show that the same marked the boundaries of its said Jumbo No. 2 Lode mining claim at the surface, and thereupon defendant caused a certificate of its location of said mining claim to be duly recorded in the office of the clerk of said Dolores county on the 31st day of August, 1892.

And defendant says that by reason of its ownership and possession of said tunnel site and tunnel and the prosecution thereof and the discovery and cutting of said Jumbo No. 2 vein therein and its full compliance with all the requirements and provisions of the statutes of the United States and of the State of Colorado and with the rules and regulations of miners of said mining district, this defendant acquiesced, and ever since the 15th day of June,
33 1892, has had and been entitled to the right of possession of said Jumbo No. 2 vein for a distance of 54 feet along the course thereof in a northeasterly direction from the point of discovery thereof in said tunnel and for a distance of 1,446 feet in a southwesterly direction along the course thereof from said point of discovery and is lawfully entitled to the possession and ownership of all ore and metals within the said vein and to the right to mine work and dispose of the same.

That by means of divers drifts and other workings made by defendant upon and within such vein, the said vein has been found in its course to extend into the premises claimed by the complainants herein as a part of the Vestal mining claim, and defendant says that shortly prior to the first day of September, 1892, but on what day defendant is unable to state, the complainants or some thereof, by and through a cross-cut or other working, secretly

wrongfully and unlawfully broke and entered into said Jumbo No. 2 vein at some point on the course thereof within 750 feet in a southwesterly direction from the point where the same was cut and discovered as aforesaid, by defendant, in its said tunnel and from that time to the present day has, as this defendant is informed and believes, been actively engaged in breaking down and removing from within said vein and is now removing and converting therefrom to their own use ore of great value and the property of this defendant.

And defendant alleges that the complainants or some thereof have wrongfully and unlawfully broken down and removed and sold ore from within said vein within 750 feet of said point of discovery thereof in said tunnel, which is the property of defendant, of the value of $10,000.

And defendant further answering, says, it appears from the location certificate of the Vestal lode, that it was claimed and located on a course S. 61° 56′ E., which is parallel with the course of the Group tunnel, which tunnel is located and excavated on a course S. 57° E.; and that if any vein or lode was discovered in the Vestal mining claim and whereupon said Vestal mining claim was located, said vein in its course would not touch or cross said Group tunnel.

And this defendant says that the said Vestal Lode mining claim in its course, is nearly parallel with the Group tunnel and does not touch any portion of the line of said tunnel but is more than 500 feet southerly therefrom.

And this defendant says that at the time the said Vestal mining claim was entered in the United States land office, as alleged in said bill of complaint, said Group tunnel had not been
34 excavated or run to a point nearer than 800 feet from that portion of the Vestal mining claim nearest to the line of said tunnel; and that prior to the time of the alleged entry of said Vestal mining claim no vein or lode had been disclosed or cut in said tunnel which extended or ran in the direction of or towards said Vestal mining claim.

And this defendant further says that the said Jumbo No. 2 vein cut in said Group tunnel at a point of 1,920 feet from the face thereof, extends in its course across and through a portion of the westerly end of said Vestal mining claim and does not for any distance along the course thereof, extend in the direction of the *direction of the* location of the said Vestal mining claim and is a course vein to such Vestal Lode mining claim.

And this defendant says that after the discovery and location of said Jumbo No. 2 vein as aforesaid, and while engaged in the prosecution of its drifts and workings upon said vein from a point within the aforesaid Jumbo mining claim of the defendant, which Jumbo Lode mining claim lies westerly from the westerly end of said Vestal mining claim, this defendant in continuing a drift along said Jumbo No. 2 vein and in a northeasterly direction, and which drift was run wholly within the walls of said Jumbo No. 2 vein, passed beyond the westerly end line of said Vestal mining claim and entered into the premises which, in the bills of complaint

herein, are alleged to be the premises of the complainants and from on or about the 10th day of August last and until restrained by an order of this court issued on the 3rd day of September, has been engaged in running a drift along and within said vein for the purpose and with the design of connecting such drift with other drifts which this defendant has also been engaged in running along and in said vein, from its point of discovery in said Group tunnel, which is the same work complained of by the complainants as trespasses committed on its property.

And this defendant says that the complainants knowing the defendant had discovered and located the said Jumbo No. 2 in said tunnel and that this defendant was working and following the same within the walls thereof toward and in the direction of the said Vestal mining claim and well knowing that this defendant had the right of possession of said vein along its course through and across said Vestal mining claim and said complainants having sunk a shaft through barren earth and rock at a distance of not less than 400 feet from the cross of said Jumbo No. 2 vein, excavated and run a cut through barren earth and rock towards and in the direction of said Jumbo No. 2 vein, for the purpose and with the
35 design of excavating and removing and converting to complainants' use ore from said Jumbo No. 2 vein within that portion thereof to the possession of which this defendant was and is entitled. And that at some time prior to the first day of September, 1892, but at what time this defendant is unable to state definitely, the complainants or some thereof through said drift run through barren country and rock, as aforesaid, broke into said Jumbo No. 2 vein and then began to break down and remove valuable ore therefrom, and that in the cross of the workings of the complainants the same were extended and driven until they intersected and met the workings of this defendant upon and within said vein and the complainants endeavored to hinder and obstruct the defendant's workmen in the regular prosecution of their work upon said vein, and likewise threatened with violence the workmen of the defendant and by force and intimidation endeavored to prevent the workmen of the defendant from continuing the prosecution of the work of defendant upon said vein.

And that defendant says that if any of the workmen of the complainant, or either thereof, were injured, as alleged in the bills of complaint, that such injuries were the result of the forcible and unlawful resistance upon the part of complainants' employés to the lawful and regular prosecution of the work of this defendant upon its said vein.

And this defendant denies that it used any violence against the workmen of the complainant or any unusual and unlawful methods in the mining and extracting the ore or that it prevented the complainants from succeeding in their efforts to exclude this defendant from its workings of its said Jumbo No. 2 vein.

And this defendant denies all and all manner of unlawful combination and confederacy, wherewith he is by the said bill charged, without this that there is any other matter, cause or thing in the

complainants' said bill of complaint contained, material or necessary for this defendant to make answer unto and not herein and hereby well and sufficiently answered, confessed, traversed and avoided or denied is true to the knowledge or belief of this defendant; all which matters and things this defendant is ready and willing to aver, maintain and prove, as this honorable court shall direct; and prays to be hence dismissed with its reasonable costs and charges in its behalf most wrongfully sustained.

THE ENTERPRISE MINING CO.
ADAIR WILSON &
CHARLES H. TOLL,
Solicitors for Defendant.
H. M. TELLER, *Of Counsel.*

36 Indorsed: No. 2827. U. S. circuit court. The Rico-Aspen Consolidated Mining Company, a corporation, *et al.*, plaintiffs, *vs.* The Enterprise Mining Company, a corporation, defendant. Answer to the bill & amended bill. Filed September 20, 1892. Robert Bailey, clerk U. S. circuit court. Charles H. Toll, sol'r for def't.

UNITED STATES OF AMERICA, *ss:*

In the Circuit Court of the United States, District of Colorado. In Chancery.

THE RICO-ASPEN CONSOLIDATED MINING COMPANY *et al.*, Complainants,
vs.
THE ENTERPRISE MINING COMPANY, Defendant.

And now, to wit, this 22nd day of September, A. D. 1892, the above-entitled cause coming on to be heard upon motion for preliminary injunction based on bill and answer and affidavits supporting bill and answer respectively, come the complainants by Charles J. Hughes, their solicitor, and the defendant by Charles H. Toll its solicitor, also comes; and the court being fully advised in the premises, it is ordered, adjudged and decreed that the complainant the said Rico-Aspen Consolidated Mining Company file its bond in the penal sum of twenty-five thousand dollars according to the customary form, with sureties to be approved by the clerk, and that thereupon an injunction issue out of and under the seal of the said court restraining the defendant, its agents, attorneys, lessees and all persons under or in privity with it, from working, mining or removing ore from any vein, lode, deposit or other ground within the end side lines of the Vestal Lode mining claim, in Pioneer mining district, county of Dolores, State of Colorado, carried perpendicularly downward.

And that defendant and all persons under it be further restrained from causing or allowing smoke to ascend into the complainants' workings or from discharging explosives upon said ground or so

near thereto as to break rock in the same, and from otherwise in any manner annoying or interfering with the complainants in the premises until the further order of court.

And it is further ordered that the complainants may send and keep from time to time as they see fit, without let or hindrance, two persons within the workings made by defendant upon said ground, to act and view as inspectors and to report to the court any
37 violation of the writ to issue under this order and Douglas L. V. Browne and Lee S. Wood are hereby named and appointed as such inspectors.

MOSES HALLETT,
Dist. Judge.

Indorsed: 2827. Rico Aspen Co. *v.* Enterprise Co. Order for injunction. Filed Sept. 22, 1892. Robert Bailey, clerk.

UNITED STATES OF AMERICA, *District of Colorado*, } ss:

Cross-bill.

In the United States Circuit Court within and for the District of Colorado. In Chancery.

THE ENTERPRISE MINING COMPANY, a Corporation, Complainant,
vs.
THE RICO-ASPEN CONSOLIDATED MINING COMPANY, a Corporation, Defendant.

To the honorable judges of the circuit court of the United States for the district of Colorado:

The Enterprise Mining Company, a corporation organized and existing under the laws of the State of New Jersey, and a citizen of the State of New Jersey, leave of court first having been had, brings its cross-bill of complaint against The Rico-Aspen Consolidated Mining Company, a corporation organized and existing under the laws of the State of Colorado, and a citizen of the State of Colorado and the complainant herein, your orator alleges and shows to your honors, that the matter in dispute herein exceeds, exclusive of interest, the sum or value of two thousand dollars ($2,000).

Your orator respectfully represents unto your honors, that on the 3rd day of September, 1892, The Rico-Aspen Consolidated Mining Company, the defendant herein, exhibited in this honorable court its bill of complaint against your orator, The Enterprise Mining Company, and thereafter and on the 8th day of September exhibited in this honorable court its amended bill of complaint wherein there were joined as co-complainants David Swickhimer and numerous other persons, each of which co-complainants was therein alleged to be a citizen of the State of Colorado.

That in and by said amended bill of complaint it was alleged

that the co-complainants of said The Rico-Aspen Consolidated
38 Company were the owners in fee of a certain mining lode claim situate in Pioneer mining district in the county of Dolores and State of Colorado; and that the said Rico-Aspen Consolidated Mining Company by and through a certain contract for purchase and lease of said Vestal mining claim, was entitled to the possession of said mining claim and to all ores and minerals therein; that this cross-complainant, The Enterprise Mining Company had theretofore trespassed upon and entered into the territory embraced within the side lines of the said Vestal mining claim extended downwardly vertically and had broken down and extracted therefrom, removed, sold and converted to its possession large and valuable quantities of gold and silver bearing ore.

And in and by said amended bill of complaint the said The Rico-Aspen Consolidated Mining Company and its co-complainants prayed your honors to grant a temporary writ of injunction restraining and enjoining this cross complainant and all persons acting through or under it, among other things, from entering into or upon either the surface or underground territory of said Vestal Lode mining claim or within the surface boundaries extending downward therefrom, or from breaking, disturbing or removing ore therefrom.

And also prayed for the granting of a mandatory injunction commanding and compelling this cross-complainant to restrain and deliver up to said compla-nants the territory and premises which it was alleged in said bill and amended bill of complaint this cross-complainant had taken wrongful and unlawful possession, and in and by which amended bill of complaint it was prayed that upon the final hearing said injunction might be made perpetual and for such other and further relief as might be in accordance with equity and good conscience.

And your orator being duly served by process, appeared and put in its answer thereto as by the said original bill of complaint and amended bill of complaint and other pleadings and proceedings in the said court, now remaining on file and of record in this honorable court, reference thereto being had, will more fully appear.

Your orator further complaining shows, as it is informed and believes, that on the 25th day of July, 1887, Charles Newman, Matthew T. Chestnut and William L. Stephens, all of whom were native-born citizens of the United States, entered upon a portion of the unoccupied public mineral domain of the United States, lying upon Newman hill in Pioneer mining district, in the county of Dolores,
and State of Colorado, and for the purpose of availing them-
39 selves of the rights conferred by the mining statutes of the United States, and in full compliance therewith, and with the laws of the State of Colorado, and with the rules and regulations of said mining district, located and claimed a certain mining tunnel site called the "Group tunnel site," upon which they then posted in a conspicuous position, a notice in writing, wherein they set out among other things the names of said locators, the name of said

tunnel and tunnel site, to wit: "the Group tunnel," the actual and proposed course of such tunnel, the height*h* and width thereof and the said date of location thereof. That said locators claimed and located said tunnel site and tunnel for the discovery of mines and with the purpose of acquiring by means of the location and excavation of said tunnel along the proposed course thereof the right of possession of all veins or lodes within 3,000 feet from the face of such tunnel on the line thereof, not previously known to exist, discovered in such tunnel, to the same extent as if discovered from the surface.

That thereupon and immediately thereafter said Newman and his said colocators began the actual work of excavating said tunnel and marked out and established the line of said tunnel site and tunnel by causing the same to be surveyed in a straight line for a distance of 3,000 feet from the said face of said tunnel where said notice was posted and caused such line to be plainly marked and established for said distance upon the surface of the earth by posts firmly set in the ground at intervals of about 100 feet and by marking said posts so that the same plainly showed them to mark the line of said tunnel site and tunnel; and thereupon the said Newman and his said colocators caused a certificate in writing of their location of said tunnel to be duly recorded in the office of the county clerk of said county, with the sworn statements of said locators thereto attached, in which was set out, among other things, the name of said tunnel, the date of the commencement of the actual work of excavation of work thereof, the date on which the same was located, and the intention of the locators thereof to prosecute the same for the purpose of prospecting for, discovering and working all lodes, veins, ledges and deposits of minerals along the line of said tunnel, and in which was also set out the amount expended up to that time in running said tunnel.

That immediately after the location of said tunnel site, and, to wit: on the 26th day of July, 1887, the said colocators and claimants commenced to run and excavate a tunnel from said point of location where said discovery notice was posted, and thereafter continuously prosecuted such tunnel through the earth and rock along the line of said tunnel site until on or about September 1st, 1891, at which time they had run and extended a tunnel along the said location a distance of more than 1,500 feet, and which tunnel was excavated to a width of 4 feet and to a height of 6 feet in the clear. That at the time of the location survey and record of said Group tunnel and the commencement of the excavation thereof, and for a long time thereafter, no vein, lode, ledge or mineral deposit had been discovered or was known to exist on or crossing the line of said Group tunnel site and tunnel, or within 1,500 feet on either side of said tunnel site and tunnel; that no vein or lode of any character whatsoever had theretofore been discovered within the premises referred to in the bills of complaint herein as the Vestal mining claim or was located or claimed or in the possession of or claimed to be in the possession of any person whatsoever, until long after the location of said tunnel site and the commencement

of the excavation of said tunnel; and that at the time of the location of said tunnel site and tunnel the premises which are alleged in the said bills of complaint to be within said Vestal Lode mining claim were wholly unoccupied and unclaimed by any person whatever, and were a portion of the public domain of the United States, but subject however to the right of the locators and owners of said tunnel site, or their grantees, to the possession of such veins or lodes as should be discovered in said tunnel, and which in their course should extend into the premises now claimed by the said complainants as said Vestal Lode mining claim.

That prior to and for a long time after the location and record of said tunnel site and certificate of location thereof and the commencement of the work of actual excavation thereof, no vein or lode bearing gold or silver or other metal had been discovered or was claimed to have been discovered at any point within the premises referred to in said bill of complaint as the Vestal mining claim, and at and for a long time subsequent to the time of the location of said tunnel site, no vein or lode was known to exist within said Vestal Lode mining claim premises.

And this cross-complainant further complaining alleges that in the month of September, 1891, the said Newman and his said co-locators who were then the owners of and in the possession of said Group tunnel site had by an outlay of more than $17,000 extended and run said tunnel to a point more than 1,500 feet from the face thereof and had therein and thereby cut and disclosed veins or lodes, the existence of which was not known previous to the location of such tunnel, and which veins or lodes were gold and silver bearing

41 veins not having an apex or cropping at the surface of the earth, but which were "blind lodes," having their tops in solid rock in place, at a great depth beneath the surface of the earth, to wit: at a depth of more than 300 — below the surface, and said owners of said tunnel site were then engaged in the continuous extension of said tunnel along and on the line of said tunnel site with the design and for the purpose of cutting therein other lodes not previously known to exist, or not known to exist prior to the said location of said tunnel.

That in or about said month of September, 1891, George Crawford, the immediate grantor of this defendant, purchased of said Newman and his co-owners their said tunnel site and tunnel with all their rights and privileges therein and thereunder, and paid therefor the sum of $250,000 in consideration whereof the said Newman and his co-owners by divers mesne conveyances granted and conveyed said tunnel site and tunnel with all the rights, privileges and franchises thereunto incident, appendant and appurtenant. And thereupon said Crawford by certain mesne conveyances, and for a large and valuable consideration by him received from this cross-complainant, likewise granted and conveyed said tunnel site and tunnel to this defendant, with all the rights, privileges and franchises thereunto incident, appendant or appurtenant, and this cross-complainant thereupon became and ever since has been and now is the lawful owner thereof and thereafter and ever since said

conveyance by said Crawford, this cross-complainant has actively and continuously prosecuted and extended said tunnel into the earth for the purpose and with the design of cutting and discovering on the line thereof veins or lodes which prior to the location of said tunnel, July 25th, 1887, had not been known to exist.

That from the time of the commencement of the actual work of excavation of said tunnel on the 26th day of July, 1887, said tunnel has been excavated and run continuously by this defendant or its grantors, and cross-complainant or its grantors have not failed at any time for the period of six months to prosecute work on said tunnel, and that this cross-complainant and its grantors have in all respects complied with the provision of the statutes of the United States, and of the State of Colorado, relating to the location, possession and ownership of tunnel sites and tunnels, run for the discovery of mines, and with the local rules and regulations of miners in said mining district; and as the owner and in possession of said tunnel, has ever since on or about the 10th day of September, 1891, been entitled to and had the right of possession of all veins, or lodes
within 3,000 feet from the surface of such tunnel on the line
42 thereof not previously known to exist, which should be discovered in such tunnel, to the same extent as if discovered from the surface and for a distance of 1,500 feet along each of such veins or lodes.

That thereafter and on, to wit: the 15th day of June, 1892, this cross-complainant while running and excavating said Group tunnel for the purpose and with the design of discovering veins or lodes not known to exist prior to the aforesaid date of location of said tunnel site and tunnel, cut and disclosed in and on the line of said tunnel at a distance of 1,920 feet from the face thereof, a vein or lode of quartz, in place, bearing gold and silver in such quantity that the same could be profitably worked and mined and which vein or lode is a "blind vein," and does not appear at the surface of the earth, but has its top or apex in solid rock in place at a depth of more than 300 feet below the surface, and which vein extends in its course across said tunnel in a northeasterly and southwesterly direction, and which vein was not prior to the location of and commencement of the excavation of said tunnel known to exist, and which vein had not prior to about the 1st day of August, 1891, been known to exist, or been found or discovered at any point in its course or length, at which time said vein was discovered by the defendant in workings remote from the line of said tunnel, and within the Jumbo mining claim owned by and in the possession of this cross-complainant.

That on the 15th day of July, 1892, and after cutting the said vein in said Group tunnel this cross-complainant duly located and claimed said vein and the possession thereof as and by the name of the Jumbo No. 2 vein, for a distance of 1,500 feet, to wit: 54 feet running north 54° 30′ E. from the point of discovery in said tunnel, and 1,446 feet running S. 54° 30′ W. from said point of discovery, with 150 feet on the northwesterly side of the middle of said vein at the surface and 150 feet on the southeasterly side of the middle

of said vein at the surface and thereupon cross-complainant on the 15th day of June, 1892, upon the surface of the earth, and on the centre line of said tunnel and vertically above the point where said vein was discovered in said tunnel, placed a notice of the discovery of said vein, and of the location thereof as the Jumbo No. 2 Lode mining claim, for the distance of 1,500 feet along its course with 150 feet on each side of the centre of said vein, 54 feet being claimed along said vein running north 54° 30′ E. from the point where said notice was posted at the surface, and 1,446 feet being claimed along said vein running south 54° 30′ W. from said point.

And thereupon this cross-complainant caused the boundaries of said mining claim and location to be duly marked and established at the surface by posts set in the ground one at each
43 corner and one at the middle of each side boundary line thereof, and caused said posts to be marked so as to show that the same marked the boundaries of its said Jumbo No. 2 Lode mining claim at the surface, and thereupon cross-complainant caused a certificate of its location of said mining claim to be duly recorded in the office of the clerk of *of* said Dolores county on the 31st day of August, 1892.

And cross-complainant says that by reason of its ownership and possession of said tunnel site and tunnel and the prosecution thereof and the discovery and cutting of said Jumbo No. 2 vein therein and its full compliance with the provisions of the statutes of the United States and the State of Colorado, and with the rules and regulations of miners of said mining district, this cross-complainant acquired, and ever since the 15th day of June, 1892, has had and been entitled to the right of possession of said Jumbo No. 2 vein for a distance of 54 feet along the course thereof in a northeasterly direction from the point of discovery thereof in said tunnel and for a distance of 1,446 feet in a southwesterly direction along the course thereof from said point of discovery, and is lawfully entitled to the possession and ownership of all ore and metals within the said vein and to the right to mine, work and dispose of the same.

That by means of divers drifts and other workings made by cross-complainant upon and within such vein, the said vein has been found in its course to extend into and across the premises claimed by the defendant herein as a part of the Vestal mining claim, and cross-complainant says that shortly prior to the 1st day of September, 1892, but on what day he is unable to state, the defendant herein by and through a cross cut or other working, secretly, wrongfully and unlawfully broke and entered into said Jumbo No. 2 vein at some point in the course thereof within 750 feet in a southwesterly direction from the point where the same was cut and discovered as aforesaid, by this cross-complainant in its said tunnel, and ever since, as cross-complainant is informed and believes, has been actively engaged in breaking down and removing ore from within said vein, and is now wrongfully removing and converting to its own use therefrom ore of great value and the property of this defendant.

And cross-complainant alleges that the defendant herein has wrongfully and unlawfully broken down, removed, sold and con-

verted to its own use ore from within said vein, and the property of this cross-complainant, of large value, and as this cross-complainant believes, of a value not less than $10,000.

And cross-complainant further complaining says, it appears from the certificate of location of said Vestal Lode mining claim,
44 that it is claimed and located on a course S. 61° 56′ E., which course is nearly parallel with the course of the Group tunnel, which tunnel is located on a course S. 57° E.; and cross-complainant says that if any vein or lode was discovered in the Vestal mining claim, and upon which the said Vestal mining claim was or could have been lawfully located, such vein in its course would not touch or cross said Group tunnel or the line thereof.

And this cross-complainant says that the said Vestal Lode mining claim in its course is nearly parallel with the Group tunnel and does not touch any portion of the line of said tunnel, but is more than 500 feet southerly therefrom.

And your orator further says that the said Jumbo No. 2 vein extends in its course across and through a portion of the westerly end of said Vestal mining claim, and does not for any distance along the course thereof extend in the direction of the course of the location of the said Vestal mining claim and is a cross-vein to such Vestal Lode mining claim.

And your orator further says that after the discovery and location of said Jumbo No. 2 vein and lode as aforesaid, and while engaged in the prosecution of its drifts and workings upon said vein from a point within the aforesaid Jumbo mining claim of your orator, which Jumbo Lode mining claim lies westerly from the westerly end of said Vestal mining claim, your orator in continuing a drift along said Jumbo No. 2 vein, and in a northeasterly direction, and which drift was run wholly within the walls of said Jumbo No. 2 vein, such drift was extended by your orator beyond the westerly end line of said Vestal mining claim, and into the premises which, in the said bills of complaint, are alleged to be the premises of the defendant herein, and from on or about the 10th day of August last, and until restrained by an order of the honorable judge of this court made on the 3rd day of this month, your orator was engaged in running a drift along and within said vein for the purpose and with the design of connecting such drift with other workings which your orator was driving along and in said vein, from the point of discovery in said Group tunnel, which is the same work complained of by the defendant and its co-complainant in its original and amended bills of complaint herein, as trespasses committed by your orator on its property.

And your orator says that the defendant well knowing that your orator had discovered and located the said Jumbo No. 2 vein in said tunnel, and that your orator was working and following the same within the walls thereof, toward and in the direction of
45 the said Vestal mining claim, and well knowing that your orator had and was entitled to the right of possession of said vein along its course through and across said Vestal mining claim, the defendant herein excavated and ran and cut through barren

earth and rock toward and in the direction of your orator's vein for a long distance for the purpose and with the design to excavate and remove and wrongfully convert to defendant's use, ore from your orator's said vein within that portion of it to which your orator was and is entitled, and that for some time prior to the 10th day of September, 1892, but at what time your orator is unable to state definitely, the defendant through said drift run in barren country and rock as aforesaid broke in said Jumbo No. 2 vein, and then began and ever since has continued and is now continuing to break down and remove valuable ore therefrom.

And that the said workings of the said defendants were extended and driven along said vein until they intersected and met the workings of your orator therein, and the defendant endeavored to hinder and obstruct your orator's workmen in the regular prosecution of their work upon their said vein, and likewise threatened with violence the workmen of your orator, and endeavored to prevent the workmen of your orator from continuing the prosecution of their work within said vein.

And your orator further says that it is informed and believes that the said defendant has ever since continued and now continues to wrongfully, fraudulently and unlawfully extend its workings on the said lode of your orator and by means of drifts, stopes, winzes and upraises run in and upon and along said vein has extracted, broken down and removed, and is continuing to extract, break down and remove large quantities of valuable gold and silver bearing ore therefrom, and threatens to continue the extraction, breaking down and removal of the ores contained in said vein, and your orator verily believes that they will so continue unless enjoined and restrained by order issuing out of this honorable court.

And your orator further alleges, upon information and belief, that the said defendant company is insolvent and wholly unable to respond in damages to your orator for the injuries thus wrongfully and unlawfully inflicted and threatened to be inflicted; and that by means of said unlawful and wrongful trespasses upon the rights of your orator by invading and breaking into its said lode, and breaking down and removing valuable gold and silver ores therefrom wrongfully and unlawfully, the said defendant is inflicting and has inflicted irreparable damage and loss upon your orator, and that your orator has no adequate relief except in a court of equity, where such matters are proper and cognizable.

46 Your orator, further complaining, alleges that in order that your orator may have full and adequate relief herein it is necessary that a proper order be entered by this honorable court herein directing and compelling the said defendant, its agents, and attorneys, and servants and employés to restore and deliver up to your said orators and their employés the said possession of said lode wrongfully invaded and the workings of which have been wrongfully and unlawfully by force and fraud taken from your said orator by the said defendant, its agents, attorneys, servants, and employés.

In consideration whereof and forasmuch as your orator is entirely remediless in the premises according to the strict rules of the com-

mon law, except by filing this, its cross-bill, in the said proceedings commenced by the said defendant herein, and its copartners against your orator prays that the said defendant herein may be required to make full and direct answer to the matters and things alleged in this cross-bill but not under oath, the answer under oath being hereby expressly waived, and that your honor may grant herein a temporary writ of injunction and restraining and enjoining said defendant, its agents, attorneys, servants and employés claiming to be acting through or under it from entering into or upon the said, the Jumbo No. 2 lode, belonging to your orator, and from breaking, destroying or removing therefrom any ore heretofore broken down or from selling, shipping or removing or receiving pay for or on account of any ore heretofore broken down within the said lode wherever the same may be; and also a mandatory injunction commanding and compelling the said defendant, its agents, servants, attorneys and employés to immediately restore and deliver to your said orator, its servants, agents, and attorneys the territory and premises of which the wrongful and unlawful possession by force and fraud which has been taken by the defendant as herein set forth; and also restraining and enjoining said defendant from in any manner interfering with your orator's possession and occupation and enjoyment of said Jumbo No. 2 lode, and from in any manner interfering with your orator's doing work and development thereon until the further order of this court, and that upon the final hearing thereof said injunction may be made perpetual.

Also for an order directing and requiring the said defendant forthwith to pay into this court or into such depository as this court may designate, subject to the order of the court, all moneys which the defendant has heretofore received or may hereafter receive from or on account of the sale of all ores extracted by it from the said Jumbo No. 2 lode.

47 Also for an order permitting your orator by surveyor and assistant to be by your said orator named, to enter into and upon all the workings of said defendant upon the said Jumbo No. 2 lode, and of the workings operated or controlled by the said defendant upon the lode mining claims adjacent thereto, owned or controlled by said defendant, in order that said surveyor may make complete and accurate surveys of said surface and workings for your said orator for use in this litigation and for the full advice and information of your orator concerning the trespass made by said defendant upon the property of your said orator as aforesaid, the amount of ore removed therefrom, possession of said workings, and other matters connected therewith, and for such other and further or different relief as to your honors may seem meet and in accordance with equity and good conscience and as thus in duty bound your orators will ever pray.

ADAIR WILSON,
CHARLES H. TOLL,
Solicitors for Cross-complainant.
H. M. TELLER &
WOLCOTT & VAILE,
Of Counsel.

STATE OF COLORADO, } ss:
County of Arapahoe, }

George Crawford, of lawful age, being first duly sworn, deposes and says, that he is the secretary of the cross-complainant, The Enterprise Mining Company, and that the president of said company is now absent from the State of Colorado; that he has been made familiar with the situation of the mines and with the acts complained of on the part of the cross-complainant in the foregoing cross-bill of complaint; that he has read the foregoing cross-bill and knows the contents thereof and that the same is true to his best knowledge and belief; and that he has obtained the information by means of personal examination of the premises and by telegrams and letters from and interviews with persons in charge of the mining premises and mining operation of the cross-complainant and by means of interviews with and statements made by persons familiar with the matters and things in the foregoing cross-complaint, all of whom are credible persons and makes this verification from his said knowledge and his office as secretary of the Enterprise Mining Company.

GEORGE CRAWFORD.

[SEAL.] Subscribed and sworn to this 21st day of September, 1892.

WARREN D. WOODMAN,
Notary Public.

My commission expires July 17th, 1894.

48 Indorsed: No. 2827. U. S. circuit court. The Enterprise Mining Company, a corporation, complainant, *vs.* The Rico-Aspen Consolidated Mining Company, a corporation, defendant. Cross-bill in chancery. Filed September 21, 1892. Robert Bailey, clerk. Charles H. Toll.

UNITED STATES OF AMERICA, } ss:
District of Colorado, }

In the Circuit Court of the United States within and for the District of Colorado.

THE RICO-ASPEN CONSOLIDATED MINING COMPANY, a Corporation, *et al.*, Plaintiffs,
vs.
THE ENTERPRISE MINING COMPANY, a Corporation, Defendant.

Restraining Order.

On reading the sworn cross-bill presented and filed by defendant in the above-entitled case, it is ordered that a hearing be had on the motion for the injunction, and further relief therein prayed for before the district judge hereof, on the 12th day of November, 1892, at 10 o'clock a. m., and that in the meantime and until the further

order of the court, the said plaintiff herein, its agents, servants, attorneys and employés and each and every of them, and all persons in privity with the complainant company shall be and they are hereby restrained from mining or extracting ore or other material, and from working the Vestal Lode mining claim situate in Pioneer mining district, Dolores county, Colorado, embraced within forty feet on either side of a vertical plane—extending through the centre of the winze sunk by the plaintiff company from the main level of the Vestal Lode mining claim, and connected with the level run by the defendant company from the Jumbo mining claim at a point eighty-eight (88) feet from the northwest end line of said Vestal Lode mining claim, on a course north 70° east and south 70° west from the centre of said winze and ending in the northwest end line, and in the northeast side line of the said Vestal mining claim; and from breaking down, extracting or removing from the said above-described territory any ore, and it is further ordered that the defendant shall give bond in the sum of twenty-five thousand dollars, with condition according to law to be approved by the court, and thereupon injunction shall issue as herein directed; and it is further ordered that the defendant may send and keep from time to time as they see fit, without let or hindrance, two persons within the workings made by the plaintiff upon said
49 ground, to act and view as inspectors, and to report to the court any violation of the writ to issue under this order; and Daniel Kirby and Thomas Kane are hereby named and appointed as such inspectors.

MOSES HALLETT,
Dist. Judge.

Sept. 22, 1892.

Indorsed: 2827. Cross-bill. Circuit court U. S. The Enterprise Mining Co. *v.* The Rico-Aspen Consolidated Mining Co. Order restraining Rico-Aspen Co. Filed Sept. 22, 1892. Robert Bailey, clerk.

UNITED STATES OF AMERICA, } ss:
District of Colorado, }

Order.

In the United States Circuit Court.

THE RICO-ASPEN CONSOLIDATED MINING CO. *et al.*, Plaintiffs, *vs.* THE ENTERPRISE MINING CO., Defendant. } No. 2827.

This cause coming on to be heard upon the petition filed by the defendant for leave to continue its drift upon the Jumbo No. 2 vein, and a hearing thereon having been had this day, counsel for both parties being present it is—

Ordered, that the defendant, The Enterprise Mining Co., is hereby

permitted to extend the drift heretofore run by it to a point about 87 feet within the northwesterly line of the Vestal mining claim as claimed by the plaintiffs, and to run said drift in and along the vein to a point vertically beneath the northeasterly side line of the Vestal Lode mining claim, as claimed at the surface by the complainants, said drift to be of a height of not more than eight feet and width of not more than four feet and to be properly timbered where necessary, so that the same may safely be examined at any time, and so as not to injure the workings made by the complainant company in said vein and above said drift and the defendant may remove and sell the ore taken out in extending such drift, but such ore shall be kept and shipped and sold separate and the proceeds or smelter returns therefrom, shall as received be deposited in court under a separate account until further ordered herein; said ore shall be sold for the best price obtainable and compl't shall be at liberty to take samples of each lot for assay until further order

— L. S. Wood, the superintendent of the plaintiff company
50 and Herbert Way may each day between the hours of eight and five o'clock of the day have access to said drift for the purpose of inspecting the same, and may also inspect and make copies of the smelter returns for the ore mined in such drift.

And it is further ordered, that copies of all affidavits and maps to be used by the complainant in the November 12th hearing in this cause, be served upon defendant's attorneys prior to November 1st, 1892.

MOSES HALLETT, *Judge.*

At chambers October 3rd, 1892.

Indorsed: 2827. Circuit court U. S. The Rico-Aspen Consol. Mining Co. *vs.* The Enterprise Mining Co. Order leave to defendant to extend drift. Filed Oct. 3, 1892. Robert Bailey, clerk.

UNITED STATES OF AMERICA, }
District of Colorado, } *ss:*

In the Circuit Court in and for said District.

THE RICO-ASPEN CONSOLIDATED MINING COMPANY *et al.*, Complainants,
vs.
THE ENTERPRISE MINING COMPANY, Respondents.

The petition of the complainants for leave to inspect and examine certain workings of the defendant company this day coming on to be heard, it is ordered that the said complainants may on to wit, the 25th day of October, A. D. 1892, and for ten days thereafter, enter into and upon all and singular the workings of the defendant company in whatever claim the same may be situate lying to the south and west of what is known as the Group tunnel, and including said tunnel whether upon the alleged contact vein within the said ground or otherwise; that the said examination and inspec-

tion may be made by ten witnesses whose names shall be served upon the superintendent of the defendant company twenty-four hours before the said examination shall commence, and the said individuals may, between the hours of seven o'clock in the morning and seven o'clock in the evening, without let, interference or hindrance, go through, into and upon the mining claims of the said defendant for the purpose of making said examination; that they shall have full and uninterrupted access to the said Group tunnel and to all workings south and west thereof and to any workings immediately above the point in said tunnel where the alleged Jumbo No. 2 vein has been cut although the said last-named workings may extend to the north and east of the line of the said tunnel
51 and pass beyond the line of on the north of which this examination is located; that the said witnesses shall be and they are hereby given permission to take samples of the ore or rock material found in said workings or any part thereof, make photographs and measurements of said workings, if they shall desire and without interfering with the workmen of said defendant to carry on their said inspection and examination as fully and completely as may be necessary to familiarize them with the conditions presented and disclosed by said workings; that Robert S. Morrison, of counsel for said complainant may accompany said witnesses if he so desires while making said examination.

It is further ordered that the defendant with a like number of witnesses may make a like examination and inspection of the workings of the complainant company in the Vestal, Compromise, Contention, Selenide, and Old Discovery Lode mining claims, save that such examination may begin after the 25th day of October aforesaid and continue for 10 days after the same commences.

MOSES HALLETT,
Dist. Judge.

Indorsed: 2827. The Rico-Aspen Con. Mining Co. *vs.* The Enterprise Mining Co. Order for witnesses. Filed Oct. 22d, 1892. Robert Bailey, clerk.

UNITED STATES OF AMERICA, }
District of Colorado, } *ss.:*

In the Circuit Court in and for said District.

THE RICO-ASPEN CONSOLIDATED MINING COMPANY *et al.*, Complainants,
vs.
THE ENTERPRISE MINING COMPANY, Respondents.

On now, to wit, this 22nd day of October, A. D. 1892, upon motion of the complainants, supported by affidavits and filed therewith it is ordered that Lee S. Wood, Herbert Way, and John Murphy shall have the right of access to the drift which the defendant company has by order of the court heretofore made, been and is

being allowed to run to the side line of the Vestal mining claim and through the Contention and Compromise claims at all times between the hours of eight in the morning and five in the afternoon of each and every day while the work is being prosecuted; that no ore shall be removed from the said drift or any part thereof except during and between the hours of eight and five o'clock aforesaid, and that the same may be accompanied by one or more of said inspectors from the said drift to the ore-house where the same
52 is to be sampled; that the said complainants shall have the right to appoint one or more persons to be present while said ore is being sampled and such person or persons shall have the right to take samples thereof for assay and may keep an account of the number of sacks of ore after the same shall have been sacked by said defendant and shall have the right to take a record of the lots of which said ore shall be composed together with the number of sacks in each lot.

MOSES HALLETT,
Dist. Judge.

Indorsed: 2827. Circuit court, dist. of Colo. The Rico-Aspen Consol. Min. Co. *vs.* The Enterprise Mining Co. Order for inspectors. Filed Oct. 22d, 1892. Robert Bailey, clerk.

UNITED STATES OF AMERICA, }
District of Colorado, } *ss:*

In the Circuit Court of the United States within and for the District of Colorado.

THE ENTERPRISE MINING COMPANY, a Corporation, Complainant, }
v. }
THE RICO-ASPEN CONSOLIDATED MINING COMPANY, a Corporation, Defendant. }

Answer of the Rico-Aspen Consolidated Mining Company to the Cross-bill of the Enterprise Mining Company.

This defendant, The Rico-Aspen Consolidated Mining Company, now and at all times hereafter saving and reserving unto itself all benefit and advantage of exception which can or may be had or taken to the many errors, uncertainties and other imperfections in the said complainant's cross-bill contained, for answer thereunto or unto so much and such parts thereof as this defendant is advised is or are material or necessary for it to make answer unto this defendant answering saith:

The said defendant, The Rico-Aspen Consolidated Mining Company together with other plaintiffs therewith joined by leave of court first had and obtained did as alleged in said cross-bill on the 3rd day of September, A. D. 1892, exhibit in this honorable court its bill of complaint against the plaintiff in said cross-bill The Enterprise Mining Company, and thereafter and on the eighth day of

September exhibited in this honorable court its amended bill of complaint, wherein there were joined as co-complainants David Swickhimer and other persons each of which co-complainants was therein alleged to be a citizen of the State of Colorado and that in and by said amended bill of complaint it was alleged that the co-complainants of said The Rico-Aspen Consolidated Mining
53 Company were the owners in fee of a certain lode mining claim situate in Pioneer mining district in the county of Dolores and State of Colorado; and that the said Rico-Aspen Consolidated Mining Company by and through a certain contract for purchase and lease of said Vestal mining claim, was entitled to the possession of said mining claim, and to all ores and minerals therein; and that the said cross-complainant, The Enterprise Mining Company, had theretofore trespassed upon and entered into the territory embraced within the side lines of the said Vestal mining claim extended downward vertically, and had broken down and extracted therefrom, removed, sold and converted to its possession, large and valuable quantities of gold and silver bearing ore.

And this defendant and its co-plaintiffs in said amended bill of complaint did pray for a temporary writ of injunction restraining and enjoining the cross-complainant and all persons acting through or under it, among other things from entering into or upon either the surface or underground territory of said Vestal Lode mining claim or within the surface boundaries extending downward therefrom, or from breaking, disturbing or removing ore therefrom.

And also prayed for the granting of a mandatory injunction commanding and compelling said cross-complainant to desist from its action, and to deliver up to said complainants the territory and premises of which it *it* was alleged in said bill and amended bill of complaint said cross-complainant had taken wrongful and unlawful possession; and further prayed in and by said amended bill of complaint that upon final hearing said injunction might be made perpetual and for such other and further and different relief as might be in accordance with equity and good conscience.

And this defendant The Rico-Aspen Consolidated Mining Company, further answering unto the said cross-complaint of the Enterprise Mining Company, denies that on the 25th day of July 1887 or at all Charles Newman, Matthew Chestnut and William L. Stephens, all of whom were as it is alleged, native-born citizens of the United States, entered upon a portion of the unoccupied public mineral domain of the United States, lying upon Bowman hill in Pioneer mining district, in the county of Dolores and State of Colorado, or for the purpose of availing themselves of the rights conferred by the mining statutes of the United States, or in full or any compliance therewith, or with the laws of the State of Colorado, or with the rules or regulations of said mining district, located or claimed a certain mining tunnel site called the "Group tunnel site" and deny that upon the same day or at all they then posted in a

conspicuous position a notice in writing wherein they set
54 out among other things the names of said locators, the name of said tunnel and tunnel site to wit: "the Group tunnel," or the actual or proposed course of such tunnel or the height*h* or width thereof, or said date of location thereof.

Deny that said locators claimed or located said alleged and pretended site or tunnel for the discovery of mines, or with the purpose of acquiring by means of the location or excavation of said tunnel along the alleged proposed course thereof, the right of possession of all or any veins or lodes within 3,000 feet from the face of such tunnel on the line thereof, not previously know- to exist, discovered in such tunnel, to the same extent as it discovered from the surface.

And this defendant further answering denies that the law provided for or authorized or permitted such location as is in said cross-bill alleged and pretended to have been made or provided for or authorized the acquisition of title to lodes by means of such tunnel to the extent of 3,000 feet, or to any extent whatever.

Denies that thereupon or immediately thereafter said Newman or his said colocators or any of them, began the actual work of excavating said tunnel, or marked out or established the line of said tunnel site or tunnel, by causing the same to be surveyed in a straight line for a distance of 3,000 feet or for any distance from the said face of said alleged tunnel, where said alleged notice was posted, or caused such line to be plainly marked or established for said distance upon the surface of the earth by posts firmly set in the ground at intervals of about 100 feet, or any other distance, or at all, or by marking said posts so that the same plainly or at all showed them to mark the said alleged line of said alleged tunnel site or tunnel.

And alleges that the said cross-complainant acquired and could acquire no rights whatever to any veins cut or penetrated, found or disclosed by said tunnel in its course, further than the same might be included within the tunnel itself without making a regular location thereof by virtue of a discovery in full compliance with the laws of the United States, the State of Colorado, and the rules and regulations of the mining district, in which said claims were located as a lode location and that in such event title thereto would date only from the actual discovery and location thereof.

And this defendant further answering said cross-bill denies that thereupon or at all the said Newman or his said locators caused a certificate in writing of their location of said tunnel to be duly or
at all recorded in the office of the county clerk of said county,
55 with the sworn or other statements of said locators there attached, in which was set out among other things or at all the name of said alleged tunnel, the date of commencement of the actual work of excavation of work thereof; the date on which the same was located, or the intention of the locators thereof to prosecute the same for the purpose of prospecting for, discovering or working all or any lodes, veins, ledges or deposits of mineral along the line of said alleged tunnel, or in which there was also or at all

set out the amount expended up to that time in running said tunnel.

Denies that immediately after the location as alleged of said tunnel site, and to wit on the 26th day of July, 1887, the said alleged colocators and claimants commenced to run and excavate a tunnel from said point of location, where said discovery notice was posted, or thereafter continuously prosecuted said tunnel through the earth and rock along the line of said tunnel site or until on or about September 1st, A. D. 1891, or that at this time they had run and excavated a tunnel along the said location a distance of more than 1,500 feet; and deny that said tunnel was excavated to a width of four feet or to a height of six feet in the clear.

Denies that at the time of the alleged and pretended location, survey or record of said alleged Group tunnel or at the time of the commencement of the excavation thereof, and for a long or any time thereafter, no vein, lode, ledge or mineral deposit had been discovered or was known to exist on or crossing the line of said alleged Group tunnel site or tunnel, or within 1,500 feet on either side of said tunnel site, or tunnel, or that no vein or lode of any character whatsoever had theretofore been discovered within the premises referred to in the bills of complaint herein as the Vestal mining claim or was located or claimed or in the possession of any person whatsoever until long after the alleged location of said tunnel site, or the alleged commencement of the excavation of said tunnel.

And denies that at the time of the location of said alleged tunnel site or tunnel the premises which are alleged in the said bills of complaint to be within the Vestal Lode mining claim were wholly or at all unoccupied or unclaimed by any person whatever, or were a portion of the public domain of the United States subject to the right of the locators and owners of said alleged tunnel site or their grantees to the possession of such veins or lodes as should be discovered in said tunnel, or which in their course should extend into the premises now claimed by the complainants as said Vestal Lode mining claim.

56 But on the contrary defendant in said cross-complaint avers that long prior to the beginning of work upon said tunnel or the extending thereof or the alleged discovery of the vein thereon there were well known to exist upon said hill and along the course thereof veins and lodes of mineral which had theretofore been discovered and appropriated and that the same had thus been discovered and appropriated within a distance of 1,500 feet upon either side of alleged and pretended tunnel or tunnel-site location; and alleged that long prior to the pretended discovery of said lode in said tunnel the said lode now claimed and pretended to have been therein found and discovered was known to exist, had been discovered disclosed and located, all of which was well known to said plaintiff in said cross-bill and to their grantors, and to the alleged locators of said pretended tunnel site and tunnel.

And defendant in said cross-bill further answering denies that prior to or for a long time after the location or record of said tunnel

site or certificate of location thereof, or the commencement of the work of actual excavation thereof as alleged, no vein or lode bearing gold or silver or other metal had been discovered or was claimed to have been at any point within the premises referred to in said bill of complaint as the Vestal mining claim or at or for a long or any time subsequent to the time of the location of said tunnel site no vein or lode was known to exist within said Vestal Lode mining claim or premises.

On the contrary alleges the facts with reference to the location of said Vestal Lode mining claim to be as more fully and particularly are set forth in the bill of complaint and amended bill heretofore herein filed; and as to the allegation of said cross-complaint that in the month of September, 1891, the said Newman and his said colocators who were the owners as alleged in said cross-bill, or as alleged therein in the possession of said Group tunnel site had by the outlay of more than $17,000—extended and run said tunnel to a point more than 1,500 feet from the face thereof this defendant is not otherwise advised than in and by said cross-bill, and demands strict proof of said allegation; but denies that they had therein or thereby cut or disclosed veins or lodes, the existence of which was not known previous to the alleged location of such tunnel, or which veins or lodes were gold and silver bearing veins not having an apex or cropping at the surface, or which were "blind lodes" having their tops in solid rock in place, at a great depth beneath the surface of the earth, to wit: at a depth of more than 300 feet.

And deny that said alleged owners of said tunnel site were then engaged in the continuous extension of said tunnel along
57 and on the line of said pretended tunnel site with the design or for the purpose of cutting therein or at all other lodes not previously known to exist or not known to exist prior to the location of said tunnel.

That as to the allegation of said cross-bill that in or about the month of September 1891 George Crawford the alleged immediate grantor of the plaintiff in said cross-bill purchased of said Newman and his alleged co-owners their said alleged tunnel and alleged tunnel site with all their rights and privileges therein and thereunder, and paid therefor the sum of $250,000 or any sum, in consideration whereof the said Newman and his co-owners by divers mesne conveyances granted and conveyed said tunnel site and tunnel with all the rights, privileges and franchises thereunto incident appendant and appurtenant, this defendant in said cross-bill is not otherwise advised and informed save as set forth in said cross-bill and demands strict proof of said allegations.

And as to the allegation in said cross-bill contained that thereupon said Crawford by certain mesne conveyances and for a large and valuable consideration by him received from said cross-complainant, likewise granted and conveyed said tunnel site and tunnel to the complainant in said cross-bill, with all the rights, privileges and franchises thereunto incident appendant or appurtenant and that this cross-complainant thereupon became and ever since has been and now is the lawful owner thereof, the defendant in said

cross-bill is not otherwise advised save as set forth in and by said cross-bill, and demands strict proof of said allegation, so far as the same may be herein material; but denies that thereafter or ever since said alleged conveyance by said Crawford said cross-complainant has actively or continuously prosecuted and extended said tunnel into the earth for the purpose or with the design of cutting or discovering on the line thereof veins or lodes which prior to the location of said tunnel, July 25th, 1887, had not been known to exist; but on the contrary this defendant alleges the fact to be that said tunnel is run so far as the same is prosecuted, for the purpose as it is informed and believes of cutting, intersecting and taking ore from veins and lodes the property of and already located by the plaintiffs in accordance with the law, and then and there being the property of the grantors and coplaintiffs in the original bill herein.

And this defendant upon information and belief further answering denies that from the time of the commencement of the actual work of excavation of said tunnel on the 26th day of July,
58 1887, as alleged, the said tunnel has been excavated and run continuously by said defendant or its grantors toward, and denies that the said cross-complainant or its grantors have not failed at any time for the period of 6 months to prosecute work on said tunnel.

And deny that said cross-complainant or its grantors have in all or in any respects complied with the provisions of the statutes of the United States or the State of Colorado relating to the location, possession and ownership of tunnel sites, and tunnels, run for the discovery of mines, or with the local rules and regulations of miners in said mining district; or as the owner or in possession of said tunnel has ever since on or about the 10th day of September, 1891, or for any part of said time, been entitled to or had the right of possession of all or any veins or lodes within 3,000 feet from the face of such tunnel on the line thereof not previously known to exist, which should be discovered in such tunnel, to the same extent as discovered from the surface, or for a distance of 1,500 feet along each of such veins or lodes or had or held or acquired or could hold or acquire by virtue of said alleged location, the right or title to any veins or lodes that might exist or be encountered in the course of said tunnel.

Denies that thereafter and on the 15th day of June, 1892, or at all said cross-complainant while running and excavating said Group tunnel for the alleged and pretended purpose or with the design of discovering veins or lodes not known to exist prior to the aforesaid date of location of said tunnel site and tunnel, cut or disclosed in or on the line of said tunnel at a distance of 1,920 feet from the face thereof or in any part thereof a vein or lode of quartz in place bearing gold and silver in such quantity that the same could be profitably worked and mined, or which vein or lode is a "blind vein" or does not appear at the surface of the earth, or has its top or apex in solid rock in place at a depth of more than 300 feet below the surface or which vein extends in its course across said tunnel in a northeasterly and southwesterly direction or across the same at all,

or which vein was not prior to the location and commencement of the excavation of said tunnel known to exist, or which vein had not prior to about the 1st day of August, 1891, been known to exist or had been found or discovered at any point in its course or length, or at which time said vein was alleged to have been discovered by the defendants in workings remote from the line of said tunnel or within the Jumbo mining claim alleged to be owned by or in the possession of said cross-complainant.

But on the contrary alleges the fact to be that said mineral thus alleged to have been found and discovered as stated in said
59 cross-complaint was a part of the vein before and long prior located discovered and owned by the owners of the Vestal mining claim; had also been discovered, located penetrated and known to exist at divers other points by other persons as well as the said defendant in this cross-bill, and its grantors.

Denies that on the 15th day of July, 1892, or at any other time or after it is alleged and pretended, cutting the said vein in said Group tunnel, this cross-complainant duly located or claimed said vein or the possession thereof as and by the name of the Jumbo Number 2 vein, for a distance of 1,500 feet, to wit: 54 feet running north 54 degrees 30 minutes east from the point of discovery in said tunnel and 1,446 feet running south 54 degrees 30 minutes west from said point of discovery, with 1,500 feet on the northwesterly side of the middle of said vein at the surface, and 150 feet on the southeasterly side of the middle of said vein at the surface; or that thereupon or at all cross-complainant on the 15th day of June, 1892, upon the surface of the earth or on the center line of said tunnel, or vertically above the point where said vein was discovered in said tunnel, placed a notice of the discovery of said vein and of the location thereof as the Jumbo No. 2 Lode mining claim, for a distance of 1,500 feet along its course with 150 feet on each side of the center of said vein, 54 feet being claimed along said vein running north 54 degrees 30 minutes east from the point where said notice was posted at the surface, and 1,446 feet being claimed along said vein running south 54 degrees 30 minutes west from said point.

But defendant in said cross-bill alleges that subsequent to the commission of its trespass by entering upon and within the territory of the Vestal mining claim and mining and extracting ore therefrom, the said cross-complainant did for the purpose of giving color and claim of title of some character to its said wrongful and unlawful conduct set up a pretended location stake, and did thereafter as it is advised and informed and believes, prepare a location certificate, and file the same. And this defendant alleges that said pretended discovery and pretended location, whatever date may have been placed upon said stake, subsequently thereto, was not made nor was said discovery and location pretended to have been made until after the commission of said trespass complained of in the original amended bill herein; and that said pretended discovery and said stake were set up within the territory and boundaries of the Hiawatha Lode mining claim a valid subsisting lode mining location in existence long prior to the pretended discovery and location of

said Jumbo Number 2 Lode mining claim, and which said claim had passed in the land office to the point where entry might be made thereof without opposition or adverse, so that it was impossible that said cross-complainant could make a valid location within said territory for the reason that the same was discovered and occupied long prior to the alleged discovery and location of said alleged Jumbo No. 2 Lode mining claim.

And defendant further alleges that long prior to said pretended location of said Jumbo No. 2 Lode mining claim and long prior to the pretended discovery of the vein upon which said location is based the coplaintiffs of this defendant had made entry of that portion of the same within the surface boundaries extended downward vertically of the Vestal Lode mining claim, in the land office and obtained a receiver's receipt therefor and were by virtue of the statutes of the State of Colorado in such cases made and provided the owners in fee thereof; so that no portion of the same was open to such alleged location or appropriation and that the said cross-complainant and his grantors well knew of the application of said grantors and coplaintiffs of this defendant to enter said Vestal Lode mining claim, and to obtain title therefor and filed no adverse, made no protest and in no manner whatever contested the same; wherefore they are estopped from setting up and maintaining said alleged claim for and on account of said tunnel location or said Jumbo No. 2 location to any of the ore, veins or lode then contained in or upon or within the boundaries of the said Vestal Lode mining claim.

And this defendant further answering denies that thereupon or at all the said cross-complainant caused the boundaries of said mining claim or location, to wit said Jumbo No. 2 Lode mining claim to be duly or at all marked or established at the surface by posts set in the ground one at each corner and one at the middle of each side boundary line thereof, or caused said posts to be marked so as to show that the same marked the boundaries of its said Jumbo No. 2 Lode mining claim at the surface; or that thereupon cross-complainant cause- a certificate of its location of said mining claim to be duly or at all recorded in the office of the clerk of said Dolores county on the 31st day of August, 1892.

And this defendant further answering denies that the said cross-complainant by reason of its alleged ownership or possession of said tunnel site or tunnel or the alleged prosecution thereof, or the alleged and pretended discovery or cutting of said Jumbo No. 2 vein therein, or its full or any compliance with the provisions of the statutes of the United States or of the State of Colorado, or with the rules and regulations of miners of said mining district or at all acquired or ever since the 15 day of June, 1892, or at any time has had or been entitled to the right of possession of said alleged Jumbo No. 2 vein for a distance of 54 feet or any distance along the alleged
61 course thereof in a northeasterly direction from the point of discovery thereof, in said tunnel, or for a distance of 1,446 feet or any distance whatever in a southwesterly direction along the alleged course thereof from said alleged point of discovery, or is law-

fully or at all entitled to the possession or ownership of all or any ore or metals within the said alleged vein, or to the right to mine, work or dispose of the same or any part or portion thereof.

Denies that by means of divers or any drifts, or other workings made by cross-complainant upon or within the said alleged vein, the said vein has been found in its course to extent into or across the premises claimed by the defendant herein as a part of the Vestal mining claim; or that shortly or at any time prior to the 1st day of December, 1992, the said defendant did secretly wrongfully or unlawfully break or enter into said alleged Jumbo No. 2 vein at any point within the course thereof within 750 or any number of feet in a southwesterly direction from the alleged point where the same was alleged to have been cut or discovered as aforesaid by cross-complainant in its said tunnel or ever since or at all has been actively or at all engaged in breaking down or removing ore from within said vein or is now or at all wrongfully removing and converting to its own use therefrom ore of great value and the property of said cross-complainant; on the contrary allege the fact to be that the said defendant as it has lawful right to do and as more fully set forth and stated in its bill of complaint herein has mined no ore whatever except such as found within the surface boundaries of said Vestal Lode mining claim extended downward vertically upon a lode therein, then and there being a part and portion of the said Vestal Lode mining claim, the property of this defendant and its said coplaintiffs in said amended bill; and this defendant denies that it has wrongfully or unlawfully broken down removed sold or converted to its own use ore found within said vein the property of this cross-complainant, of large of any value or of the value of not less than 10,000 dollars.

And defendant further answering denies that if any vein or lode was discovered in the Vestal mining claim or upon which the said Vestal mining claim was or could have been lawfully located, such vein in its course would not touch or cross said Group tunnel or the line thereof.

On the contrary alleges the fact to be that said tunnel was so run as to underlie the main vein and lode existing in the said Vestal Lode mining claim, and of which the ores mined by this defendant were at all times a part and parcel.

Defendant further answering denies that the alleged and pretended Jumbo No. 2 vein extends in its alleged course across
62 or through a portion of the westerly end of said Vestal mining claim, or does not for any distance along the course thereof extend in the direction of the course of the location of the said Vestal mining claim or is a cross-vein to such Vestal Lode mining claim; but on the contrary the defendant alleges the fact to be that the said ores which the said cross-complainant alleges to be the Jumbo No. 2 lode are a part and parcel of the Vestal lode duly located, appropriated and covered by the Vestal Lode mining claim, and not a separate, distinct or cross lode thereto.

Defendant further answering denies that after the alleged and pretended discovery or alleged and pretended location of said Jumbo

No. 2 vein or lode as aforesaid, or while engaged in the alleged prosecution of its drifts and workings upon said vein from a point within the aforesaid Jumbo mining claim of said cross-complainant, in running a drift along said pretended Jumbo No. 2 vein and in a northeasterly direction, which the defendant denies was wholly or at all within the pretended walls of said Jumbo No. 2 vein, such drift was extended by the cross-complainant beyond the westerly end line of said Vestal mining claim and into the premises which in said bills of complaint are alleged to be the premises of the defendant herein.

And denies that from on or about the 10th day of August last or until restrained by an order of this honorable court made on the third day of this month said cross-complainant was engaged in running a drift along or within said vein for the purpose or with the design of connecting such drift with other workings which said cross-complainant was driving along or in said pretended vein from the pretended point of discovery in said Group tunnel; but on the contrary alleges the fact to be that the said workings run without the surface boundaries of the Vestal Lode mining claim by the said cross-complainant were run there for the purpose of secretly wrongfull- and unlawfully appropriating and converting to its own use the ores then and there being a part of the Vestal Lode mining claim and the property of this defendant, and its coplaintiff in the amended bill herein.

And this defendant further answering says that said workings were not run upon a separate different and distinct vein alleged to be the Jumbo No. 2 vein, but in and upon a portion and part and parcel of the lode theretofore located and owned in fee by the said defendant and its co-complainants in said original and amended bills herein and to which the said cross-complainant had no right title or interest of any character whatsoever as it well knew at the time of the commission of said trespass.

63 And defendant further answering denies that the defendant well or at all knowing that said cross-complainant had discovered or located the alleged and pretended Jumbo No. 2 vein in said tunnel, or that said cross-complainant was working or following the same within the pretended walls thereof toward or in the direction of the said Vestal mining claim, or well or at all knowing that the said cross-complainant was entitled to or had the right of possession of said vein along its course through and across said Vestal mining claim, and the defendant denies that such was the case, the defendant herein excavated or ran or cut through barren earth or rock toward or in the direction of the cross-complainant's alleged and pretended vein or along or any distance for the purpose or with the design to excavate or remove or wrongfully convert to defendant's use ore from the cross-complainant's pretended vein within that portion of it to which said cross-complainant claims it was or is entitled.

Deny that within the surface boundaries extended downward vertically of said Vestal Lode mining claim this cross-complainant was entitled to any ores or minerals whatsoever; on the contrary

allege the fact to be that the same were the property of the owners of said Vestal Lode mining claim hereinbefore named. And on the contrary alleges that the workings run by it in and upon said property were proper development work upon the lode and vein of said Vestal Lode mining claim which the defendants and co-complainants in said original bill had full right and lawful authority to run make and extend.

And denies that the said defendant threatened with violence the workmen of said cross-complainant, or did anything which they had not full lawful authority and right to do within said premises, but that instead of resorting to violence and lawlessness in a reckless disregard of life and limbs of employés and persons therein working, as said cross-complainant did this defendant resorted to this honorable court for an injunction to stop the wrongful and unlawful acts of said cross-complainant within the boundaries of said lode mining claim as fully appears by the bill of complaint and amended bill of complaint herein filed.

Defendant further answering denies that it has taken or threatens to take wrongfully or unlawfully any ores from within the boundaries of the said Vestal Lode mining claim, but alleges it has been its purpose and intention as it had full right and lawful authority to do, to mine, extract, remove and dispose of said ore as the property of these defendants and co-complainants in the original and amended complaint herein, the ores found within the surface
64 boundaries extended downward vertically of the Vestal Lode mining claim.

And defendant further answering denies that the said defendant company is insolvent or wholly or at all unable to respond in damages to the cross-complainant for the pretended injuries in its said cross-bill alleged to be wrongfully and unlawfully inflicted: and denies that the said cross-complainant has been so informed. And denies that the alleged and pretended trespass complained of therein will work great or any damage, loss or injury to said cross-complainant.

And defendant further answering denies that the said plaintiff has in or by its said bill disclosed the right to any relief whatever; and denies that upon the facts as they exist the said cross-complainant is entitled to any injunction order for survey or any of the relief prayed for in its said cross-bill or to any relief whatever.

And the defendant further answering alleges that long prior to the acquisition by the said cross-complainant of the pretended titles upon which it relies in said bill of complaint, its said grantors by means of contracts and agreements entered into with the grantors of and the coplaintiffs by this defendant in its original bill herein named agreed that they should not enter into or upon the surface boundaries of said Vestal Lode mining claim or make any locations or set up any claim of title or interest whatever to the said premises or any ores therein contained, and that said contracts thus made and entered into ran with the title of the said property so acquired by the said cross-complainant from its said grantor, and

bound and estopped the said cross-complainant from setting up, asserting or maintaining the interests and claims which it asserts and pretends in its said cross-bill herein to the ores found within the surface boundaries extended downward vertically of the said Vestal Lode mining claim and that by virtue of said contract and the reliance thereon in good faith by the co-complainants of this defendant in cross-bill and by this defendant, and the expenditure of large sums of mone- in the discovery, location and maintenance of said lode mining claims and the developing of the valuable ore bodies therein contained, the said defendant may not have assert or set up any right, title, interest or claim whatsoever in or to the said ores found within the said surface boundaries of the said Vestal Lode mining claim extended downward vertically.

And this defendant denies all and all manner of unlawful combination and confederacy wherewith it is by the said cross-bill charged without this, that there is any other matter cause or thing in the said cross-complainant's said cross-
65 bill contained, material or necessary for this defendant to make answer unto, and not herein and hereby well and sufficiently answered, confessed, traversed and avoided or denied, is true to the knowledge of this defendant; all of which matters and things this defendant is ready and willing to aver, maintain and prove, as this honorable court shall direct, and humbly prays to be hence dismissed with his reasonable costs and charges in this behalf most wrongfully sustained.

R. S. MORRISON,
JOHN KINKAID,
C. S. THOMAS, AND
CHARLES J. HUGHES, JR.,
Solicitors for Defendant, The Rico-Aspen Consolidated Mining Co.

Indorsed: 2827. In the circuit court of the United States. The Enterprise Mining Company, complainant, *vs.* The Rico-Aspen Consolidated Mining Company, defendant. Answer to cross-bill. Filed Nov. 30, 1892. Robert Bailey, clerk.

UNITED STATES OF AMERICA, *ss:*

In the Circuit Court of the United States, District of Colorado.
In Chancery.

THE ENTERPRISE MINING COMPANY, Complainant in Cross-bill, *vs.* THE RICO-ASPEN CONSOLIDATED MINING COMPANY, Defendant to Cross-bill.	No. 2827.

And now, to wit, this 6th day of January, A. D. 1893, this cause having heretofore come on to be heard upon the cross-bill, the answer thereto and the affidavits filed in support of the cross-bill and

the answer respectively, the court being fully advised in the premises and the parties being present in open court, the cross-complainant by Joel F. Vaile, its solicitor and the respondent to the cross-bill by C. J. Hughes, Jr., its solicitor, it is ordered by the court that the prayer of the cross-complainant for a writ of injunction be denied and that the restraining order heretofore on to wit: the 21st day of September, A. D. 1892, entered against the respondent, be set aside and vacated and the parties are directed to present their form of final decree, and any requests for leave to take further testimony or for damages on dissolution within ten days from date of the entry of this order.

MOSES HALLETT,
Dist. Judge.

Indorsed: 2827. U. S. circuit court. Rico-Aspen Co. *v.* Enterprise Co. Order dissolving restraining order. Filed Jan'y 6, 1893. Robert Bailey, clerk.

66 TUESDAY, *January* 31*st*, *A. D.* 1893.

Bill for an Injunction and for Other Relief.

THE RICO-ASPEN CONSOLIDATED MINING COMPANY
vs.
THE ENTERPRISE MINING COMPANY. } 2827. In Chancery.

At this day comes the defendant by C. H. Toll, Esqr., its attorney and deposits to the credit of this cause in the registry of the court, to wit: the First National Bank of Denver, the sum of eighteen dollars and forty-five cents ($18.45) and eight hundred and seventy-three dollars ($873.00).

In the Circuit Court of the United States in and for the District of Colorado.

THE RICO-ASPEN MINING COMPANY, Plaintiff,
vs.
THE ENTERPRISE MINING COMPANY, Defendant.

In this cause it appearing to the court that there are now funds on deposit in the registry of this court to the credit of the above cause, and it appearing to the court that the International Trust Company, of Denver, Colorado, is a responsible financial institution, authorized by law to receive deposits from this court, and is willing to pay interest upon such deposits, and counsel for all parties in said cause having consented to this order, it is hereby ordered that the clerk of this court shall forthwith deposit all moneys and funds in his hands to the credit of the above action and all moneys and funds which shall hereafter come into his hands in the above action, with the International Trust Company aforesaid, taking certificates of deposit according to the rules and practice of this court and obtaining interest upon said deposit as may be agreed upon.

MOSES HALLETT,
Dist. Judge.

Indorsed: No. 2827. In the circuit court. The Rico-Aspen Mining Co., plaintiff, *vs.* The Enterprise Mining Co., defendant. Order to transfer money in registry to International Trust Co. Filed Feb. 17, 1893. Robert Bailey, clerk. Pattison, Edsall & Hobson, 711–814 Ernest-Cramer building, Denver, Colo.

67 First Day, May Term.

TUESDAY, *May 2d, A. D.* 1893.

Bill for an Injunction and for Other Relief.

THE RICO-ASPEN CONSOLIDATED MINING COMPANY *et al.* *vs.* THE ENTERPRISE MINING COMPANY. } 2827. In Chancery.

At this day come the said complainants by C. S. Thomas, Esq., their solicitor, and the said respondents by Adair Wilson Esq. its solicitor also comes.

And thereupon on motion of the said complainants it is ordered by the court, that they may file copies of certain affidavits used at the hearing of this cause.

UNITED STATES OF AMERICA, *District of Colorado,* } *ss:*

In the Circuit Court of the United States in and for said District.
In Chancery.

THE RICO-ASPEN CONSOLIDATED MINING COMPANY, a Corporation; David Swickhimer, Laura D. Swickhimer, A. P. Adams, John S. Green, John Kinkaid, A. Q. Headley, Julius Thompson, and Frank W. Ingersoll, Complainants, *vs.* THE ENTERPRISE MINING COMPANY, Defendant. } No. 2827.

It is hereby stipulated by and between the parties to the above-entitled cause that the same shall be determined and final decree entered therein, subject to the right of appeal, upon the issues as joined upon the bill and cross-bill, and upon the affidavits and documentary evidence hereinafter mentioned, which shall be taken and considered for all the purposes of said cause as if the evidence had been regularly taken before the master and as if the witnesses who made said affidavits had personally appeared and been examined and cross-examined. The affidavits and documents so to be treated as a part of this cause on behalf of the complainants are as follows, to wit:

Affidavit of Claud M. Eye, dated Sept. 6th, 1892.

Affidavit of David H. Moffat, dated Sept. 7, 1892.

Affidavit- of E. B. Quigley, John C. Clark and Charles Carman, dated Sept. 7, 1892.

Affidavit of Patrick Dumphrey, dated Sept. 8, 1892.
Affidavit of James T. Mingey, dated Sept. 9, 1892.
Affidavit of Eben Smith, dated Sept. 9, 1892.
Affidavit of Claud M. Eve, dated Sept. 10, 1892.
Affidavit of S. R. Fitzgerald, dated Sept. 14, 1892.
Affidavit of Frank Wyman, dated Sept. 14, 1892.
68 Affidavit of H. N. Honeywell, dated Sept. 15, 1892.
Affidavit of Douglas L. V. Browne, dated Sept. 15, 1892.
Affidavit of Lee S. Wood, dated Sept. 17, 1892.
Affidavit of Max Boehmer, dated Sept. 17, 1892.
Affidavit of J. B. Landon, dated —— —, —.
Affidavit of A. B. Roeder, dated Sept. 20, 1892.
Affidavit of H. W. L. Way, dated Oct. 7, 1892.
Affidavit of Lee S. Wood, dated Oct. 12, 1892.
Affidavit of David Swickhimer, dated Oct. 28, 1892.
Affidavit of F. T. Freeland, dated Nov. 2, 1892.
Joint affidavit of Max Boehmer, L. S. Noble, F. T. Freeland, W. B. Page, Arthur Litchfield, E. E. Chase, W. H. Wiley, J. D. Murphy, and E. L. Foster, dated Nov. 2, 1892, together with the plat referred to and made a part of said affidavit and marked Exhibit One.
Joint affidavit of E. E. Chase, L. S. Noble, dated Nov. 2, 1892.
Affidavit of J. D. Murphy, dated Nov. 17, 1892, with map attached to the first affidavit of Max Boehmer dated Sept. 17, 1892, referred to in the above list.

And whereas the original of said affidavits for some reason cannot be found, search having been duly made therefor in the office of the clerk of said court, and like search having been made among the papers in the offices of counsel on both sides of said controversy, it is further stipulated and agreed that copies of said papers now in the possession of the attorney for the complainants hereinabove made may be filed with the clerk of said court and stand as the original affidavits theretofore offered and read in said cause, said copies after such filing to be treated and considered in all respects as if they were the original affidavits so used.

In addition to the above affidavits and documents this stipulation shall include as part of the record the following additional affidavits and documents:

Affidavit of Max Boehmer, dated Sept. 3, 1892.
Affidavit of D. L. F. Browne, H. W. L. Way, Lee S. Wood, dated Oct. 13, 1892.
Affidavit of A. B. Roeder, dated Dec. 1, 1892, with exhibits attached.
Certified copy receiver's receipt for the Vestal Lode mining claim.
Certified copy of the receiver's receipt on the Jumbo Lode mining claim.
Certified copy of a certain contract dated March 3, 1890, concerning certain lode mining claims therein mentioned between E. H. Hackett, E. L. Davis, and H. Mundee, Julius Thompson,
69 F. W. Ingersoll, Laura D. Sickhimer, David Sickhimer, A. P. Adams and Samuel Flemming.

Also certified copy of a certain contract dated July 23, 1890, by and between David Swickhimer, Laura D. Swickhimer, A. P. Adams, W. E. Sorrelle, W. G. Barnett, Julius Thompson, F. W. Ingersoll and John Kinkaid of and concerning certain lode claims therein mentioned.

On behalf of the defendant, The Enterprise Mining Company, the following affidavits are to be treated as a part of said record:

Affidavit of George M. Yeakel, dated Sept. 9, 1892.
Affidavit of James Dockery, dated Sept. 9, 1892.
Affidavit of Nick Welsh, dated Sept. 9, 1892.
Affidavit of Thomas Burns, dated Sept. 9, 1892.
Affidavit of Alexander J. Tozer, dated Sept. 10, 1892.
Affidavit of Robert Williams, dated Sept. 10, 1892.
Affidavit of Andrew Kelley, dated Sept. 10, 1892.
Affidavit of Alford C. Woodruff, dated Sept. 10, 1892.
Affidavit of W. J. Grandstaff, dated Sept. 10, 1892.
Affidavit of Alonzo H. Davis, dated Sept. 10, 1892.
Affidavit of Thomas Kane, dated Sept. 10, 1892.
Affidavit of Lloyd Morgan, dated Sept. 10, 1892.
Affidavit of Lloyd Morgan, dated Sept. 13, 1892.
Affidavit of Thomas Kane, dated Sept. 14, 1892.
Affidavit of Oliver P. Posey, dated Sept. 17, 1892.
Affidavit of Charles Newman, dated Sept. 14, 1892, and Exhibit A.
Affidavit of Edward N. Van Courtlandt, dated Sept. 20, 1892.
Affidavit of John B. Farnish, dated Sept. 16, 1892, with map marked John B. Farnish, Exhibit A.
Affidavit — Daniel Kirby, dated Sept. 17, 1892, and Exhibit A.
Affidavit of Elery W. Hunt, dated Sept. 20, 1892, with map marked E. W. Hunt, Exhibit A.
Affidavit of George Crawford, dated Sept. 20, 1892.
Affidavit of Daniel Kirby, dated Oct. 23, 1892.
Affidavit of Louis D. Ricketts, dated Nov. 25, 1892, with Exhibit A.
Affidavit of C. S. Batterman, dated Nov. 25, 1892, with cut A. and cut 2.
Affidavit of Sidney W. Tyler, dated Nov. 25, 1892.
Affidavit of Edward G. Stoiber, dated Nov. 25, 1892.
Affidavit of George S. Raymer, dated Nov. 25, 1892.
Affidavit of Henry H. Knox, dated Nov. 25, 1892.
Affidavit of John B. Farish, dated Nov. 25, 1892, with "Exhibit A."

Also location certificate of the Group tunnel site, dated July 25, 1887, recorded in Book 11, page 140 of the Dolores county records.

70 Also location certificate of the Jumbo No. 2 lode, dated August 31, 1892, recorded August 31, 1892, in Book 31, at page 121 of the county records of Dolores county, Colorado.

Also location certificate of the Vestal Lode mining claim bearing date April 2, 1888, and recorded in Book 21, at page 294 of said records.

Also amended location certificate of the Vestal Lode mining claim dated November 18, 1889, and recorded in Book 26, at page 122 of said records.

Also amended location certificate of the Vestal Lode mining claim dated December 28, 1889, and recorded December 28, 1889, in the office of the county clerk of Dolores county, Colorado.

And, whereas, in a written opinion heretofore filed in this cause on a preliminary hearing, (which opinion is reported in 53 Federal Reporter, page 321,) the date of the location of the Vestal Lode mining claim was stated to be in 1879, and of older date than the location of the Group tunnel.

And, whereas, for the purposes of final hearing and decree the location certificates of said Vestal Lode mining claim and of said Group tunnel site, giving the dates of said locations, respectively, have been put in evidence under this stipulation.

Now, it is hereby further stipulated and agreed that nothing contained in said opinion shall be construed or taken as a finding of fact to the effect that the Vestal location was prior in date to the location of said Group tunnel site.

CHAS. J. HUGHES, JR.,
R. S. MORRISON, &
C. S. THOMAS,
Solicitors for Complainant.
CHAS. H. TOLL,
WOLCOTT & VAILE,
Solicitors for Defendant and Cross-complainant.

Dated May 22d, A. D. 1893.

Indorsed: 2827. Circuit c't U. S. Rico-Aspen Con. M. Co. *et al.* v. Enterprise M. Co. Stipulation as to evidence. Filed May 22, 1893. Robert Bailey, clerk.

71 UNITED STATES OF AMERICA, *District of Colorado,* } *ss:*

In the Circuit Court in and for said District.

THE RICO-ASPEN CONSOLIDATED MINING COMPANY *et al.*, Plaintiffs,
vs.
THE ENTERPRISE MINING COMPANY, Defendant.

It is hereby agreed that the stipulation relating to the testimony in this cause be altered and modified in this particular:

1. That a copy of the patent of the Vestal lode be inserted in said record in place of the receiver's receipt mentioned in said stipulation.

2. That the location certificate of the Jumbo lode be inserted therein in place of the receiver's receipt mentioned in said stipula-

tion, no such receipt ever having been issued by the Government for said premises.

C. J. HUGHES, JR.,
R. S. MORRISON,
C. S. THOMAS,
Attorneys for Plaintiffs.
C. H. TOLL,
H. M. TELLER,
WOLCOTT & VAILE,
Attorneys for Defendant.

Dated this 5th day of June, A. D. 1893.

Indorsed: 2827. U. S. circuit court. Rico-Aspen Con. Min. Co. *vs.* Enterprise Min. Co. Stipulation as to testimony. Filed June 7, 1893. Robert Bailey, clerk.

UNITED STATES OF AMERICA, } ss:
District of Colorado, }

In the Circuit Court of the United States for the District of Colorado.

THE RICO-ASPEN CONSOLIDATED MINING COMPANY, a Corporation, and David Swickhimer, Laura D. Swickhimer, A. P. Adams, Washington S. Green, John Kinkaid, A. O. Headley, Julius Thompson, and Frank W. Ingersoll, Plaintiffs,
vs.
THE ENTERPRISE MINING COMPANY, a Corporation, Defendant.

STATE OF COLORADO, } ss:
County of Dolores, }

Clyde M. Eye, being first duly sworn according to law, de-
72 poses and says: That he is a citizen of the United States, over the age of twenty-one years, and that for more than four months last past he has been engaged by The Rico-Aspen Consolidated Mining Company, one of the plaintiffs in the above-entitled action, as a surveyor, engaged in surveys in and about the mining property owned or operated by said company on Dolores mountain in the Pioneer mining district, Dolores county, State of Colorado, and that he has been continuously engaged upon said work during said time, and is still in the employ of said company and engaged on said work. That he is familiar with all the workings, shafts, drifts, levels, stopes, winzes and upraises in the "Vestal" Lode mining claim and within the surface boundaries of said claim, extended downward vertically, and has surveyed and platted all of said workings and measured the same, and that he has also run out and surveyed and measured the drift and level run by the Enterprise Mining Company from the point at which said drift and level was run by said Enterprise Mining Company, from the Jumbo Lode mining claim belonging to said Enterprise Mining Company,

over and across the westward end line of the Vestal Lode mining claim, extended downward vertically to the breast of said level and drift being the point at which said level and drift connected with the winze driven by the Rico-Aspen Consolidated Mining Company, within said Vestal Lode mining claim, from the main working level of said Vestal Lode mining claim.

And that the distance driven by the said Enterprise Mining Company upon said level and within the surface boundaries of said Vestal Lode mining claim is eighty-seven and one-half feet, and that said drift and level was so timbered by the said Enterprise Mining Company along the greater part of the same within said Vestal ground, and that affiant does not know the character of mineral in said level so driven, except the character of the same as it appeared in the breast of said level; and affiant further says, that the mineral in the breast of said level was of high grade, and average samples taken in his presence and assayed by J. W. Edwards, assayer, gave an average value in gold and silver as follows, to wit: 515.9 ounces of silver, and 2.63 ounces of gold, as affiant is informed and believes; and affiant further says, that said samples were taken in his presence, and he believes they were average samples at this point.

And affiant further says, that said level running into the said Vestal ground is run at a distance of about twenty feet underneath the contact of silver-bearing ore into said Vestal Lode mining claim and within the surface boundaries of the said "Vestal" Lode mining claim, extended down vertically, and that the said
73 Enterprise Mining Company has run a drift and stope upon said contact from the said Jumbo Lode mining claim into the western end of the Vestal Lode mining claim, and has extended said drift and stope from said western line of the Vestal Lode mining claim, extended downward vertically, into and upon said Vestal Lode mining claim and upon said contact for a distance of more than thirty feet, as the same appeared by actual survey and measurement made by affiant on the 30th day of August, 1892; and affiant further says, that said drift and stope, throughout the length of the same in the said Vestal ground is run in rich ore, as affiant is informed and believes, and that the foreman in charge of said work for the Enterprise Mining Company stated to affiant and others, that said ore, so taken out of said drift and stope had averaged about $900 in value per ton, and that said contact formation was at the breast of said drift or stope about one foot in thickness, which affiant believes was about the average thickness in said stope for a distance said stope and drift was run on said 30th day of August in and upon the Vestal Lode mining claim and within the lines thereof, extended downward vertically.

And affiant further says, that he assisted in making the survey of said Jumbo level, and said level or drift upon said contract on the 29th and 30th days of August, 1892, and that said survey was made by himself as an assistant to Max Boehmer, representing the Rico-Aspen Consolidated Mining Company, and that it was made as a joint survey with Ellery W. Hunt as surveyor, representing

the Enterprise Mining Company, and that Daniel L. Kirby, superintendent in charge of said work for the Enterprise Mining Company was present during a portion of the time that said survey was being made, and that said Kirby admitted that said drift and stope upon the contact had been run into the Vestal Lode mining claim, and within the surface boundaries thereof extended downward vertically for a distance of about thirty or forty feet, and made said admissions while said survey was being made on the 30th day of August, 1892; and further affiant saith not.

C. M. EYE.

Subscribed and sworn to before me this 6th day of September, A. D. 1892.

BEN. H. PELTON,
Notary Public.

My commission expires June 8th, 1896.

74 UNITED STATES OF AMERICA, } ss:
District of Colorado, }

In the United — Circuit Court within and for the District of Colorado.

THE RICO-ASPEN CONSOLIDATED MINING COMPANY, a Corporation, and David Swickhimer, Laura D. Swickhimer, A. P. Adams, Washington S. Greene, John Kinkaid, A. O. Headley, Julius Thompson, and Frank W. Ingersoll, Plaintiff-.

vs.

THE ENTERPRISE MINING COMPANY, a Corporation, Defendant.

STATE OF COLORADO, } ss:
County of Dolores, }

Clyde M. Eye, being first duly sworn according to law, deposes and says, that he is a citizen of the United States, over the age of twenty-one years, and that for more than four months last past has been engaged by The Rico-Aspen Consolidated Mining Company, one of the plaintiffs in the above-entitled action, as a surveyor engaged in surveys in and about the mining properties owned or operated by said company, on Dolores mountain, in the Pioneer mining district, Dolores county, State of Colorado, and that he has been continuously engaged upon said work during said time and is still in the employ of said company and engaged upon such work; that he is familiar with all the workings, shafts, drifts, levels, stopes and winzes and upraises in the Vestal Lode mining claim, and within the surface boundaries of said claim extended downward vertically, and has surveyed and platted all of said workings and measured the same, and that he has also run out and surveyed and measured the drift and level run by the Enterprise Mining Company upon the vein known and called the Jumbo vein, from the point at which said drift and level was run by said Enterprise Mining Company, from the Jumbo Lode mining claim belonging to said

Enterprise Mining Company, over and across the western end line of the Vestal Lode mining claim, extending downward vertically to the breast of said level and drift, being the point at which said level and drift connected with the winzes driven by the Rico-Aspen Consolidated Mining Company, within said Vestal Lode mining claim, from the main working level in said Vestal Lode mining claim; and that the distance driven by the said Enterprise Mining Company upon said level and within the surface boundaries of the said Vestal Lode mining claim, is eighty-seven and a half feet, and that said drift and level was so timbered by the said Enterprise Mining Company along the greater part of the same within said Vestal ground that the vein cannot be seen, and that affiant does not know the character of the vein or mineral in said level so driven except the character of the same as it appeared in the breast of said level.

And affiant further says that the mineral in the breast of said level was of a high grade and average samples taken in his presence and assayed by J. W. Edwards assayer, gave an average value in gold and silver as follows, to wit: 515.4 ounces of silver and 2.63 ounces of gold, as affiant is informed and believes; and affiant further says that said samples were taken in his presence, and he believes they were average samples of said vein at said point, and that said vein was about one foot in width at said point, and appeared to be a strong and well-defined vertical or fissure vein; and affiant further says that said level upon the so-called Jumbo vein running into the said Vestal ground is run at a distance of about twenty feet underneath the contact of flat vein of silver-bearing ore in the said Vestal Lode mining claim, and within the surface boundaries of said Vestal Lode mining claim, extended downward vertically, and that the said Enterprise Mining Company has run a drift and stope under said contact or flat vein from the said Jumbo Lode mining claim, into the western end of the Vestal Lode mining claim and has extended said drift and stope from said western line of the Vestal Lode mining claim, extended downward vertically into and upon the said Vestal Lode mining claim, and upon said contact or flat vein for a distance of more than thirty feet, as the same appeared by actual survey and measurement made by affiant on the 13th day of August 1892.

And affiant further says that said drift and stope throughout the length of the same in the said Vestal ground is run in rich ore, as affiant is informed and believes, and that the foreman in charge of said work for the Enterprise Mining Company stated to affiant and others that said ore so taken out of said drift and stope had averaged about nine hundred dollars in value per ton; and that said contact flat vein was at the breast of said drift or stope about one foot in thickness, which affiant believes was about the average thickness of said vein in said stope for a distance said stope and drift was run on the 30th day of August in and upon the Vestal Lode mining claim within the boundaries thereof extended downward vertically.

And affiant further says that he has assisted in making the sur-

vey on said level upon said Jumbo vein, and said level or drift upon said flat vein, on the 20th and 30th days of August, 1892, and that said survey was made by himself as an assistant to Max Boehmer, representing the Rico-Aspen Consolidated Mining
76 Company, and that it was made as a joint survey with Ellery W. Hunt as surveyor representing the Enterprise Mining Company, and that Daniel L. Kirby, superintendent in charge of said work for the Enterprise Mining Company, was present during a portion of the time that said survey was being made, and that said Kirby admitted that said drift and stope upon the contact or flat vein had been run into the Vestal Lode mining claim, and within the surface boundaries thereof, extended downward vertically, for a distance of about thirty or forty feet, and made said admission while said survey was being made on the 30th day of August, 1892.

And further affiant saith not.

C. M. EYE.

Subscribed and sworn to before me this 6th day of September, A. D. 1892.

WM. B. HESS,
Notary Public.

My commission expires June 4, A. D. 1894.

UNITED STATES OF AMERICA, } *ss:*
District of Colorado, }

In the Circuit Court of the United States in and for said District.

THE RICO-ASPEN CONSOLIDATED MINING COMPANY *et al.*, Plaintiff-, }
vs. }
THE ENTERPRISE MINING COMPANY, Defendant. }

STATE OF COLORADO, } *ss:*
County of Arapahoe, }

David H. Moffat, being first duly sworn, according to law, deposes and says: That he is and since April 29th, 1892, has been the treasurer of the complainant company, in charge of and operating the mines and affairs thereof; that among the other mining claims of the complainant company is a lode mining claim known as and called the Vestal, in and upon which are numerous workings of the complainant company, consisting of drifts, inclines, levels, &c.; that the defendant company is, and for some time past, has been engaged in working upon and developing certain mining claims, portions of which are in the immediate vicinity of the southerly end of the said Vestal Lode mining claim, that as near as affiant can now remember he received information about the middle of the month of August, 1892, that the defendant company had run its drift and workings across their boundary lines over and into the said Vestal Lode
77 mining claim and were and for some time past have been engaged in mining, removing, shipping and converting to

their own use, ores belonging to the complainant company in said mining claim, said information having been derived from those in charge of the complainant company's workings on the ground in the county of Dolores and State of Colorado, where said mines are situate; that upon receiving said information, affiant, together with Eben Smith, the general manager of said complainant company, sought and secured an interview with George Crawford, who was, as affiant was then informed and believed, the president of the said defendant company, said interview being held at the First National bank in the city of Denver, in said first-named county and State; that at said interview the said Crawford produced and exhibited a map of the underground workings of the said Enterprise Company, from and by which it appeared that the workings of the defendant company had not been penetrated into or upon the Vestal Lode mining claim or any other of the mining claims of the said complainant company; that the said Crawford declared that the said map was made by the engineer of the defendant company from actual surveys lately taken, and was a correct representation of the position of things underground; that the said Crawford then and there assured affiant and the said Smith that said defendant company had not extended its workings across the boundaries of their said property, and had not entered into or upon the premises of the Rico-Aspen Consolidated Mining Company, and that any and all information received by affiant and the said Smith to the contrary was untrue. Affiant further states that during the said conversation the said Crawford complained to affiant about affiant deceiving and relying upon information obtained from his own superintendent and workmen, saying that instead of relying upon the representations and statements of such men he should believe upon the assertions and representations of the said Crawford; that the said two companies were the owners of neighboring properties and should have confidence in the good faith and statements of each other; that affiant replied in substance that he had confidence in the men who were in charge of the complainant company's mines, and relied upon the representations made by them, and had a right to expect that they would be made in accordance with the facts, and would be true. Affiant further alleges, that at said interview he asked the said Crawford to unite with him in having a joint survey of the workings made by engineers to be selected by the two companies for the purpose of determining the exact situation of the workings underground to the satisfaction of both parties, and for the purpose of determining the accuracy of his own as well as the repre-
78 sentations of the employés of the complainant company, to which the said Crawford finally assented; that the complainant company selected Max Boemer, Esq., a civil and mining engineer, resident at Leadville, Colorado, who, as affiant is informed and believes, was, after the delay of a number of days, permitted to make survey of some of the workings of the said company. Affiant further alleges, that said Crawford insisted and declared so emphatically that his company had not crossed the boundaries of the complainant company's said mines, that he had relied upon said

vey on said level upon said Jumbo vein, and said level or drift upon said flat vein, on the 20th and 30th days of August, 1892, and that said survey was made by himself as an assistant to Max Boehmer, representing the Rico-Aspen Consolidated Mining
76 Company, and that it was made as a joint survey with Ellery W. Hunt as surveyor representing the Enterprise Mining Company, and that Daniel L. Kirby, superintendent in charge of said work for the Enterprise Mining Company, was present during a portion of the time that said survey was being made, and that said Kirby admitted that said drift and stope upon the contact or flat vein had been run into the Vestal Lode mining claim, and within the surface boundaries thereof, extended downward vertically, for a distance of about thirty or forty feet, and made said admission while said survey was being made on the 30th day of August, 1892.

And further affiant saith not.

C. M. EYE.

Subscribed and sworn to before me this 6th day of September, A. D. 1892.

WM. B. HESS,
Notary Public.

My commission expires June 4, A. D. 1894.

UNITED STATES OF AMERICA, } ss:
District of Colorado, }

In the Circuit Court of the United States in and for said District.

THE RICO-ASPEN CONSOLIDATED MINING COMPANY *et al.*, Plaintiff-, }
vs. }
THE ENTERPRISE MINING COMPANY, Defendant. }

STATE OF COLORADO, } ss:
County of Arapahoe, }

David H. Moffat, being first duly sworn, according to law, deposes and says: That he is and since April 29th, 1892, has been the treasurer of the complainant company, in charge of and operating the mines and affairs thereof; that among the other mining claims of the complainant company is a lode mining claim known as and called the Vestal, in and upon which are numerous workings of the complainant company, consisting of drifts, inclines, levels, &c.; that the defendant company is, and for some time past, has been engaged in working upon and developing certain mining claims, portions of which are in the immediate vicinity of the southerly end of the said Vestal Lode mining claim, that as near as affiant can now remember he received information about the middle of the month of August, 1892, that the defendant company had run its drift and workings across their boundary lines over and into the said Vestal Lode
77 mining claim and were and for some time past have been engaged in mining, removing, shipping and converting to

their own use, ores belonging to the complainant company in said mining claim, said information having been derived from those in charge of the complainant company's workings on the ground in the county of Dolores and State of Colorado, where said mines are situate; that upon receiving said information, affiant, together with Eben Smith, the general manager of said complainant company, sought and secured an interview with George Crawford, who was, as affiant was then informed and believed, the president of the said defendant company, said interview being held at the First National bank in the city of Denver, in said first-named county and State; that at said interview the said Crawford produced and exhibited a map of the underground workings of the said Enterprise Company, from and by which it appeared that the workings of the defendant company had not been penetrated into or upon the Vestal Lode mining claim or any other of the mining claims of the said complainant company; that the said Crawford declared that the said map was made by the engineer of the defendant company from actual surveys lately taken, and was a correct representation of the position of things underground; that the said Crawford then and there assured affiant and the said Smith that said defendant company had not extended its workings across the boundaries of their said property, and had not entered into or upon the premises of the Rico-Aspen Consolidated Mining Company, and that any and all information received by affiant and the said Smith to the contrary was untrue. Affiant further states that during the said conversation the said Crawford complained to affiant about affiant deceiving and relying upon information obtained from his own superintendent and workmen, saying that instead of relying upon the representations and statements of such men he should believe upon the assertions and representations of the said Crawford; that the said two companies were the owners of neighboring properties and should have confidence in the good faith and statements of each other; that affiant replied in substance that he had confidence in the men who were in charge of the complainant company's mines, and relied upon the representations made by them, and had a right to expect that they would be made in accordance with the facts, and would be true. Affiant further alleges, that at said interview he asked the said Crawford to unite with him in having a joint survey of the workings made by engineers to be selected by the two companies for the purpose of determining the exact situation of the workings underground to the satisfaction of both parties, and for the purpose of determining the accuracy of his own as well as the repre-
78 sentations of the employés of the complainant company, to which the said Crawford finally assented; that the complainant company selected Max Boemer, Esq., a civil and mining engineer, resident at Leadville, Colorado, who, as affiant is informed and believes, was, after the delay of a number of days, permitted to make survey of some of the workings of the said company. Affiant further alleges, that said Crawford insisted and declared so emphatically that his company had not crossed the boundaries of the complainant company's said mines, that he had relied upon said

representations, and felt that his own employés had probably been misinformed as to the actual condition of things, but that, upon reliable information since received by him, affiant believes that at and before the time of said interview and while the said Crawford was making such representations, the workmen had crossed the boundary line aforesaid, and had been and *was* secretly and unlawfully engaged in mining, removing and selling the ores of the complainant company from the Vestal mine by means of underground drifts and workings, reached from their own premises adjoining, and that these representations, made by the said Crawford to affiant, were intended and calculated to deceive and mislead affiant to quit his fear and suspicions, in order to enable the said defendant company to continue its said depredations as long as possible, and that said Crawford then knew that both his map and his statements were false and misleading, and intended to deceive affiant, and others interested in the defendant company.

(Signed) DAVID H. MOFFATT.

Subscribed and sworn to before me this 7th day of September, A. D. 1892.

THOMAS KEELY,
Notary Public.

My commission expires May 20th, 1894.

Affidavit.

UNITED STATES OF AMERICA, }
District of Colorado, } *ss:*

In the United States Circuit Court within and for the District of Colorado.

THE RICO-ASPEN CONSOLIDATED MINING COMPANY, a Corporation, and David Swickhimer, Laura D. Swickhimer, A. P. Adams, Washington S. Green, John Kinkaid, A. O. Hedley, Julius Thompson, and Frank W. Ingersoll, Plaintiffs,
vs.
THE ENTERPRISE MINING COMPANY, a Corporation, Defendant.

79 STATE OF COLORADO, }
County of Dolores, } *ss:*

E. B. Quigley, John C. Clark and Charles Cannan, being first duly sworn according to law, each for himself and not one for the other, deposes and says, that he is a citizen of the United States, and that he has been engaged in mining for many years; that he is over the age of twenty-one years, and that he is now engaged in mining in the county of Dolores and State of Colorado; and affiant says that on the 15th day of September, 1892, he entered into the Vestal Lode mining claim and passed through the workings thereof, and that he examined the damages which had been done to such workings by the blasts which had been set off therein by the Enterprise

Mining Company and its employés and agents, and he was informed, and upon careful examination of the premises found the following facts, to wit:

1. That the winze connecting the drift by which said Enterprise Mining Company, as affiant was informed, entered into the said Vestal Lode mining claim with the drift used by and belonging to the Rico-Aspen Consolidated Mining Company, was untimbered and was surrounded by debris at the top; that a drift 24 feet in length, and being a part of the workings of the said Vestal Lode mining claim, connects the said winze with a station; that such drift was in good condition at the time when affiant examined the same, and was untimbered; that the ground thereabout was such ground as may be safely worked without timbering, and that said station was timbered with three square sets of timbers, the posts being 6 feet and 4 inches in length, with 5-foot caps, all such timbers being about 12 inches in diameter, and that all of the said timbers were destroyed by fire and crushed by the caving rock. That some of the caps aforesaid were burned in two and half of some of them burned entirely up; that the rock was badly caved from the top and sides of said stations, and to all appearances seemed to affiant to have been greatly shattered and broken by a terrific blast of powder or other explosion material; that the fire which burned the timbers in said station must have been started within the same, as the sides of the timbers standing next to the drift leading from the winze were burned, while the back side of such timbers next to such winze showed no evidence of fire.

2. That running easterly from said station was indrift in which three sets of timbers, consisting of 6½-foot posts, about 10 inches in diameter, with 4-foot caps, were all burned out, and that at the top of the station was a raise in which the timbers for a distance
80 of twenty feet were all completely burned out, and that such timbers consisted of stulls four feet apart and lined with 2-inch plank, and the ladder-way in such raise was destroyed for a distance of twenty feet; and that the rock about *about* the top and sides of such raise was badly shattered and broken and in a very dangerous condition.

3. That a drift runs in a southeasterly direction from said raise towards the shaft on said Vestal Lode mine, and that for 56 feet in said drift there were no timbers, and affiant was informed that said drift had not been timbered for such distance; that commencing at a point in said drift 56 feet from said station, there were 40 feet of said drift in which the timbers had been blown down, and the rock from the sides and at the top of said drift badly caved, as affiant is informed, and affiant was also informed that an air pipe which had been in use in said drift had been torn in pieces by the blasts, set off as aforesaid, and affiant saw portions of said pipe lying along said drift for a distance of 240 feet, and such pipe was twisted and broken, and presented the appearance of having been destroyed by a concussion of some great explosion; that affiant saw numerous pieces of said air pipe sticking into the sides of the timbers in said

drift, where they had been forced, as affiant was informed, by the said blast.

4. That at a point in said last-named drift 250 feet distant from said station is another raise with a lining and a ladder-way in same, and that said lining and ladder-way were broken to pieces for a distance of 15 feet extending up such raise; and that the air pipe therein for several feet was broken and twisted, and the elbow was torn therefrom and lying at some distance in the drift.

5. That all of the ground so explored by the affiant, as aforesaid, was good, firm rock, and affiant was informed, and as must have been the case, judging from the character of the rock and the formation, with which affiant is well acquainted, and from the condition of the other ground, which affiant there saw and which presented no appearance of having been affected by blasts; that nearly all of said ground examined by affiant as aforesaid was scattered, and affiant verily believes that its broken condition resulted from one or more terrific blasts set off in such workings. And further affiant saith not.

(Signed) E. B. QUIGLEY.
JOHN C. CLARK.
CHAS. KENNAN.

Subscribed and sworn to before me this 7th day of September, A. D. 1892.

WILLIAM B. HESS,
Notary Public.

My commission expires May 6th, A. D. 1894.

81 UNITED STATES OF AMERICA, } ss:
District of Colorado, }

In the United States Circuit Court within and for said District of Colorado.

THE RICO-ASPEN CONSOLIDATED MINING COMPANY, a Corporation, and David Swickhimer, Laura D. Swickhimer, A. P. Adams, Washington S. Greene, John Kinkaid, A. O. Headley, Julius Thompson, and Frank W. Ingersoll, Plaintiffs,
vs.
THE ENTERPRISE MINING COMPANY, a Corporation, Defendant.

STATE OF COLORADO, } ss:
County of Dolores, }

Patrick Dumphrey, being first duly sworn according to law, deposes and says; that, for more than ten years last past, he has been engaged in the business of mining and as a mining blacksmith, and that he is familiar with the Vestal Lode mining claim in the Pioneer mining district, Dolores county, State of Colorado, and with the workings therein, and that on the night of September first, 1892, between the hours of 9 and 10 o'clock p. m. of said day he was engaged with Frank Walters, in covering over the winze in said Ves-

tal Lode mining claim which connected with the main working and main level of the "Vestal" mine with a certain level and drift run in and upon the "Vestal" Lode mining claim, by the Enterprise Mining Company; and that affiant and said Walter were covering said winze with canvas and dirt in order to prevent the fumes and smoke, which the Enterprise Mining Company was making in said winze from coming into the upper workings of the Vestal Lode mining claim.

And affiant further says that it was necessary to cover over said winze to prevent said smoke from coming up in order that the miners and workmen and employés of the Rico-Aspen Consolidated Mining Company might continue in the workings of said claim; and affiant says that the smoke which was being driven through said winze from below by said Enterprise Mining Company and its employés, was charged with sulphur or some other noxious material which rendered said smoke very offensive and made it impossible for any one to work in the same for any considerable period of time, and that such smoke was not powder smoke or such smoke as is made in blasting in mining operation, as affiant believes.

And affiant further says that the employés of the Enterprise Mining Company who were working in the bottom of the said
82 winze, or near the bottom thereof, gave notice to affiant and said Walter whenever they were about to shoot or set off any blasts in the bottom of said winze, and that they set off three ordinary mining blasts and shots in said winze about ten o'clock p. m. on said night and gave notice when they were about to shoot; that between eleven and 12 o'clock p. m. on said night, the employés of the Enterprise Mining Company notified affiant and the said Walter that they were about to shoot again, and that the said Walter asked the employés of the said Enterprise Mining Company how many shots they were about to put off, and they answered distinctly that they were about to put off one shot, but made no other statement or remark concerning the same; and affiant believes that had any other statement or remark been made at said time by such employés of the Enterprise Mining Company, or any one in the bottom of said winze he would have heard it, and that when said notice was so given that one shot was about to be put off in said winze, affiant and the said Walter went away from said winze along the drift and level in said mine to an upraise and staking above said level a distance of about thirty feet from said winze, and a point at which they believed they would be perfectly safe if any ordinary mining blast or blasts be set off in said winze; and that there were at said point and near them in said drift at said time, Lee S. Wood, the superintendent, and James H. Bishop, foreman, and Robert McCollough, a miner in the employ of the Rico-Aspen Consolidated Mining Company, and that, while they waited for the explosion of said blast a terrific explosion occurred in said winze, knocking down and injuring the said Lee S. Wood, and at the same time blowing the covering off of said winze; and affiant believes from his knowledge, as a miner and from his experience in the handling of mining explosives that said explosion was not

caused by any ordinary mining blast, but that the same was a large amount of giant powder exploded in the bottom of said winze, by the Enterprise Mining Company and its agent for the purpose of blowing the cover from said winze, and for the purpose of taking possession of the workings in the Vestal Lode mining claim, belonging to the plaintiffs, in the above-entitled action and for the purpose of frightening and intimidating the employés of the Rico-Aspen Consolidated Mining Company from working in said mine and for the purpose of driving them out with fire and smoke and fumes from the possession of the workings of said mine. And further affiant saith not.

PATRICK DUMPHREY.

Subscribed and sworn to before me this 8th day of September, A. D. 1892.

WILLIAM B. HESS,
Notary Public.

My commission expires May 6th, A. D. 1894.

83 *Affidavit of James T. Mingey.*

UNITED STATES OF AMERICA, } ss:
District of Colorado, }

In the United States — Court within and for the District of Colorado.

THE RICO-ASPEN CONSOLIDATED MINING COMPANY, a Corporation, *et al.*, Plaintiffs,
vs.
THE ENTERPRISE MINING COMPANY, a Corporation, Defendant.

STATE OF COLORADO, } ss:
County of Dolores, }

James T. Mingey, being first duly sworn upon his corporal oath, deposes and says: I am forty-one years of age. I am a miner and have been engaged in that business continuously for the thirteen years last past.

I am now in the employ of the plaintiff company as a miner and timberman and have been since the 27th day of last July. I had been working on September 1st, 1892 and for some time previous in the drift of the plaintiff which finally connected on said — with the drift of the defendant company. I had frequently heard warnings exchanged between the men working in both properties, when either intended to fire a shot and these warnings had been heard and respected by the other. Before any connections had been made between these workings, these warnings had been given by rappings on the walls of the workings. On the morning of September second last, I saw and conversed with the men in the employ of the plaintiff company who were working under and in company with Foreman Woods the night previous in the drift of the plaintiff company, at the time when shots were fired by the defendant com-

pany and Mr. Woods was hurt. They said that they heard the warning given by the Jumbo or Enterprise men; that they intended to fire the last shot which they did fire, but that they, thinking that it would be only a squib did not go back far enough. The men whom I heard make this statement were Robert McCollough and Frank Walter.

(Signed) JAMES T. MINGEY.

Subscribed and sworn to before me this 9th day of September, A. D. 1892.

(Signed) WILLIAM B. HESS,
Notary Public.

My commission expires May 6th, 1894.

84 UNITED STATES OF AMERICA, } ss:
District of Colorado, }

In the Circuit Court of the United States in and for said District.

THE RICO-ASPEN CONSOLIDATED MINING COMPANY *et al.* }
vs. }
THE ENTERPRISE MINING COMPANY, Defendant. }

STATE OF COLORADO, } ss:
County of Lake, }

Eben Smith, being first duly sworn, deposes and says, that he is a miner by occupation, a resident of Leadville, Colorado and general manager of the complainant company's mines near Rico, in Dolores county, Colorado; that he is familiar with the location of the mines of the complainant and defendant companies in said Dolores county and, by reason of his employment is familiar with the underground workings of the complainant company's mine, including, among others, the Vestal Lode mining claim; that a portion of the property of the defendant company lies to the south of the end line and near to the said Vestal Lode mining claim in which part of said defendant company's properties are, as he is informed and believes, workings of an extensive character; that from information received some time during the early part of the month of August, 1892, affiant believes that the defendant company was secretly and unlawfully engaged in removing from the said Vestal Lode mining claim the valuable ores of the complainant company through and by means of drifts, tunnels and other underground workings, run from its own property across the said end line of the Vestal Lode mining claim, and into and upon the same; that he caused David H. Moffat, Esq., president of said company, to be informed of his suspicions, in consequence of which some time about the middle of the month of August, 1892, the said Moffat obtained an interview with George Crawford, the president of the said defendant company, affiant is informed and believes, he, the said Crawford, then being in the city of Denver, and said interview being held at the First National bank in said city; that on said occasion, the said Crawford, being informed of the suspicion of affiant and the said

Moffat, produced a map of the underground workings of the said Enterprise Mining Company, which the said Crawford declared in the presence of affiant to have been made by the engineers of said company, and to correctly represent the condition of its underground workings; that it appeared from said map that none of the workings or development of the said defendant company had penetrated into, across, or underneath the vertical boundaries of said
85 Vestal mine or any other mines of the defendant company, but that the same were within the vertical boundaries of the Enterprise Mining Company's premises; that the said Crawford then and there declared to the said Moffat and assured him that the said Enterprise Company's workmen had not trespassed anywhere upon the complainant company's property, that they were not taking, removing or shipping ore or mining in said premises at any point, and complained because the said Moffat was disposed to listen to or credit the statement of his own employés to the contrary; he, the said Crawford, stating in substance, that the two companies being neighbors, should have confidence in each other, and that the said Moffat should believe him, the said Crawford, in preference to his own employés, or any of the-, with reference to the condition and workings of the Enterprise Mining Company. Affiant further says that the said Moffat then and there requested the said Crawford to agree that a joint survey of said underground workings should be made by engineers to be appointed on each side, and which survey would determine matters to the satisfaction of all concerned to which request the said Crawford assented, an- Max Boemer of Leadville, was named on behalf of the complainant company; the survey to be made at once. Affiant says, notwithstanding the said agreement, the said Boemer was delayed in making said survey for a period of — days, and then went about to make the same, it was conceded by the engineer of said defendant company that the workings were across the boundary lines of the Vestal. Affiant further says, upon information and belief, that at and before the time when said Crawford assured the said Moffat that no trespass had been committed the employés of the said defendant company, with the knowledge and approval of the said Crawford had driven their drifts and workings across and into the boundaries of the Vestal Lode mining claim, and were then and before engaged in surreptitiously and wrongfully mining, removing and selling the valuable ores of the complainant company, and that the said representatives were made and maps shown to the said Moffat for the purpose of deceiving and misleading him, together with affiant, to the end that the spoliation of said Vestal Lode mining claim should be continued as long as possible. And further affiant saith not.

EBEN SMITH.

Subscribed and sworn to before me this ninth day of September, A. D. 1892.

My commission expires June 4th, 1895.

H. G. LEONARD,
Notary Public.

86 UNITED STATES OF AMERICA, } ss:
District of Colorado, }

In the United States Circuit Court within and for the District of Colorado.

THE RICO-ASPEN CONSOLIDATED MINING COMPANY, a Corporation, and David Swickhimer, Laura D. Swickhimer, A. P. Adams, Washington S. Green, John Kinkaid, A. O. Headley, Julius Thompson, and Frank W. Ingersoll, Plaintiffs,
vs.
THE ENTERPRISE MINING COMPANY, a Corporation, Defendant.

STATE OF COLORADO, } ss:
County of Dolores, }

Clyde M. Eye, being first duly sworn, according to law, deposes and says, that he is a citizen of the United States, over the age of twenty-one years, and that his occupation is that of a surveyor, and that for more than four months last past he has been engaged in the capacity of a surveyor for the Rico-Aspen Consolidated Mining Company, and during said time has been in active service for said company in the Pioneer mining district, Dolores county and State of Colorado, and that he is familiar with the location of the Vestal Lode mining claim, survey lot 6252, with the Jumbo Lode mining claim and the Group Tunnel location on said Dolores mountain, the said Jumbo Lode mining claim and the said Group tunnel being owned or operated by the Enterprise Mining Company, and the said Vestal Lode mining claim being operated by the said The Rico-Aspen Consolidated Mining Company, and that he has platted said mining claims and said tunnel location, as the same appeared of record in the official records of Dolores county, aforesaid, and that he is also familiar with the location of the so-called Jumbo No. 2 Lode mining claim, located by the said Enterprise Mining Company, and that it is claimed in the location certificate upon said mining claim (set upon the surface of the ground and upon the line of said Group tunnel, as it is claimed at a point directly and vertically above the point of discovery by means of said Group tunnel) that the vein was cut in said tunnel at a distance of 1,920 feet from the entrance of the said Group tunnel, which said vein is named and called by said Enterprise Mining Company, the Jumbo No. 2 lode and vein.

And affiant further says that he has surveyed and run out a certain vertical vein of silver-bearing ore throughout all the workings upon the same in the Jumbo Lode mining claim, and within the Vestal Lode mining claim, and that the whole distance along said vein developed and disclosed by all of said
87 workings upon the same made by the said Enterprise Mining Company and its grantors, in the Jumbo Lode mining claim, and in the Vestal Lode mining claim, and made by the Rico-Aspen Consolidated Mining Company in the Vestal Lode mining claim, is 600 feet and that it is upon said vein and the ore therein contained

that the controversy between the plaintiffs and the defendant in the above-entitled action has arisen, and affiant is informed and believes that the defendant, The Enterprising Mining Company, claims said vein in the Vestal Lode mining claim, and within the surface boundaries thereof, extended downward vertically, as cross-lode and vein, and that it is in truth and in fact the same vein discovered by it in the Group tunnel, 1,920 feet from the entrance thereof, and called by it the Jumbo No. 2 lode.

And affiant further says, that beginning at a point in the Jumbo Lode mining claim where the Jumbo cross-cut runs by the defendant and its grantors, cuts said vertical vein in said Jumbo mining claim, and taking the average course of said vein for a distance of 236 feet along the same (to a point 30½ feet within the end line of the Vestal Lode mining claim, said portion of the vein for said distance being wholly undisturbed and unbroken by cross-veins), the course of said vein is for said distance north 67 degrees east, and that if the line running from the point where said Jumbo cross-cut intersects said vein through the point upon said vein thirty and a half feet within the Vestal Lode mining claim was pursued upon said course until it intersected the line and course of the Group tunnel, such intersection would occur at a point at least 2,150 feet from the entrance of said Group tunnel, and at a point at least 250 feet ahead of the location stake of the said Jumbo No. 2 Lode mining claim, set upon the surface of the line of said Group tunnel.

And affiant further says, that at said point upon said vein thirty and a half feet within the Vestal Lode mining claim, said vein changes its course in running eastward, and that the course of said vein from said point for a distance of 125 feet the whole distance the same is developed from said point eastward, the course of said vein is north eighty degrees thirty minutes east, and that if said vein continued upon said course it would intersect the line of the Group tunnel at a point at least 2,450 feet from the entrance of said tunnel and at least 530 feet ahead of the stake of the Jumbo No 2 Lode mining claim on the line of said tunnel, and affiant further says, that at a point on said vertical vein 87½ feet within the lines of the Vestal Lode mining claim there is a certain winze or upraise connecting the portion of the level on said vein run by the
88 Enterprise Mining Company in and upon said Vestal Lode mining claim with the level about twenty feet above and upon said vein run by the Rico-Aspen Consolidated Mining Company, and that said winze is situated a distance of 680 feet from the discovery stake upon the surface of the Jumbo No. 2 Lode mining claim upon the line of the Group tunnel aforesaid, and that said winze is situate a distance of 780 feet from a point on said Group tunnel 2,150 feet from the entrance thereof being the point at which said vein upon the first course herein given would intersect the line of said tunnel if the same continued on said course and that said winze is situated a distance of 970 feet from a point at which said vein would intersect the line of said Group tunnel if the same continued upon the last course of said vein herein given.

And further affiant saith not.

C. M. EYE.

[SEAL.] Sworn to and subscribed before me this 10th day of September, A. D. 1892.

H. G. LEONARD,
Notary Public.

My commission expires June 4, A. D. 1895.

UNITED STATES OF AMERICA, } ss:
District of Colorado, }

Affidavit.

In the United States Circuit Court within and for the District of Colorado.

THE RICO-ASPEN CONSOLIDATED MINING COMPANY, a Corporation, and David Swickhimer, Laura D. Swickhimer, A. P. Adams, Washington S. Greene, John Kinkaid, A. O. Headley, Julius Thompson, and Frank W. Ingersoll, Plaintiffs,
vs.
THE ENTERPRISE MINING COMPANY, a Corporation, Defendant.

STATE OF COLORADO, } ss:
County of Dolores, }

Stephen W. Fitzgerald, being first duly sworn according to law, deposes and says that he is a citizen of the United States over the age of twenty one years, and that he is by profession a lawyer, and that for more than two years last past he has been interested in the "Aspen" mining claim and other mining properties on Dolores mountain, in the Pioneer mining district Dolores county and State of Colorado, and that said properties adjoin the "Vestal"
89 Lode mining claim owned and operated by the plaintiffs in the above-entitled action, and that he is familiar with the workings, drifts, levels, stopes, shafts and winzes within the surface boundaries of the "Vestal" Lode mining claim extended downward vertically, and is familiar with the lines and surface boundaries of the said "Vestal" Lode mining claim in said mining district, county and State, and that he was in said mines and examined the workings thereof on the — day of August, 1892 and that he again revisited said mine and went through the workings thereof, on the 6th day of September, 1892 and that he examined said workings, within the said "Vestal" Lode mining claim for the purpose of determining what damage had been done by fires and blasts and the setting off of giant powder which was said to have been done by the Enterprise Mining Company, its agents, servants and employés, and that he discovered that the fire in said mine, had been to all appearances kindled in and upon the upraises and timbers of the upraise and station in the main level and drift in the "Vestal" Lode mining claim by some one, and he believes that said fire could not have been started or maintained for a sufficient length of time to have burned out said timbers in the manner in which they

were burned, except by the addition of dryer and more combustible materials.

And affiant further says that the fire so made in said level is situated a distance of about 30 or 35 feet toward the shaft in the "Aspen" claim from the winze within said claim which connects the workings made in said claim by the Rico-Aspen Consolidated Mining Company, with the workings in said claim made by the Enterprise Mining Company from below; that the drift and workings upon said "Vestal" Lode mining claim, so made by the Enterprise Mining Company, is run in and upon the "Vestal" Lode mining claim, and that the Enterprise Mining Company crossed the vertical end line of the "Vestal" Lode mining claim from the "Jumbo" Lode mining claim and that, after said fire had been kindled by the Enterprise Mining Company, in the main level in the "Vestal" Lode mining claim, situated about twenty feet higher than the level so driven by the Enterprise Mining Company, affiant is informed and believes that the said Enterprise Mining Company by means of said fire, smoke and fumes drove out the workmen engaged throughout the "Vestal" Lode mining claim and held possession of said property from midnight of the first day of September until the morning of the 4th day of September.

And affiant further says that said fire could not have been communicated from the workings so made by the Enterprise
90 Mining Company, to said upraise and station within the "Vestal" Lode mining claim, so made by the Rico-Aspen Consolidated Mining Company, for the reason the unburned timbers intervened between the winze and said fire.

And affiant further says that said fire and destruction and damage was not confined in said "Vestal" mining claim and the workings thereof, made by the Rico-Aspen Consolidated Mining Company, and that for a long distance within the surface lines of the "Vestal" Lode mining claim, extended downward vertically, along the level in said "Vestal" Lode mining claim, the timbers, air pipe, ladders and upraises had been blown out, wrecked and demolished and a large amount of earth and rock had been blown from the roof of said level and drift; and affiant was informed and believes that all of said damage had been done by the Enterprise Mining Company for the purpose of intimidating the workmen, engaged in said "Vestal" Lode mining claim and for the purpose of driving and keeping them out of the same.

And affiant further says that he has no interest whatever in the "Vestal" Lode mining claim and that he is not interested in the above-entitled action in any manner.

And further affiant saith not.

S. W. FITZGERALD.

Subscribed & sworn to this 14th day of Sept. A. D. 1892.

WILLIAM B. HESS,
Notary Public.

Commission expires May 6, '94.

UNITED STATES OF AMERICA, } *ss:*
District of Colorado, }

In the United States Circuit Court within and for the District of Colorado.

THE RICO-ASPEN CONSOLIDATED MINING COMPANY, a Corporation, and David Swickhimer, Laura D. Swickhimer, A. P. Adams, Washington S. Green, John Kinkaid, A. O. Headley, Julius Thompson, and Frank W. Ingersoll, Plaintiffs,

vs.

THE ENTERPRISE MINING COMPANY, a Corporation, Defendant.

STATE OF COLORADO, } *ss:*
County of Dolores, }

Frank Wyman, being first duly sworn according to law, deposes and says, that he is a citizen of the United States, over the
91 age of thirty-eight years, and that for more than eight years last past he has been engaged in mining and in the handling of mining explosives and giant powder, and that for more than three months last past he has been engaged by the Rico-Aspen Consolidated Mining Company upon the Vestal Lode mining claim and the Vestal workings on Dolores mountain, in Pioneer mining district, Dolores county and State of Colorado, and that he was engaged at work in said mine on the 9th day of September last from six o'clock in the evening of said — until the morning of September 2d, 1892, that he is familiar with the working in the said Vestal mine, and with the workings connected therewith in the Aspen mine, operated by the said, The Rico-Aspen Consolidated Mining Company, and is familiar with the levels, drifts, winzes, stopes and upraises in said mine, and that the said The Rico-Aspen Cons-lidated Mining Company had run a cross-cut from the Vestal shaft to a certain vertical vein within the surface lines of the Vestal Lode mining claim, extended downward vertically, and had run along said vertical vein a distance of about fifty feet, and had made an upraise on or near said vertical vein at the point where said vertical veins joined with the contact or overlying flat vein of ore in said Vestal Lode mining claim; the affiant further says that at a point thirty-three feet in a western direction from said upraise on said vein, which is called upraise No. 3 in the workings of said Vestal Lode mining claim, a certain winze was sunk at the end of the level and drift run on said vein by the Rico-Aspen Consolidated Mining Company to a depth of about twenty-two feet, and that the Enterprise Mining Company, by a certain level and drift run upon or along said vein from the workings of the Jumbo Lode mining claim, which lies westward on the end line of said Vestal Lode mining claim, run in and upon said Vestal Lode mining claim for a distance of about seventy-eight feet, at which point the said Enterprise Mining Company connected with the bottom of said winze and that Enterprise Mining Company broke into said winze on the afternoon of September 1st, 1892, and that the Rico-Aspen Consolidated Min-

ing Company, hearing that the said Enterprise Mining Company would break into said winze and drive them out of their workings in the said Vestal Lode mining claim, covered over said winze in their level, and at the top thereof by placing a frame of green hewed timbers around the top of the same, and nailing inch boards to said timbers, and they also placed in said covering a trap-door, which could be lifted up or shut, as they desired.

And affiant further says, that he was in that portion of the Vestal workings between ten and eleven o'clock on the night of September 1st, 1892, and that the Enterprise Mining Company had
92 broken into the bottom of said winze and that the workmen at the bottom of said winze in the employ of the said Enterprise Mining Company gave notice to the workmen of the Rico-Aspen Consolidated Mining Company that they were about to shoot and let off four shots in the bottom of winze; and affiant further says that he and the other workmen of the Rico-Aspen Consolidated Mining Company left said trap-door over said winze closed, and went away from said winze along said drift to the eastward, a distance of about 33 feet, and waited until such shots were set off, and that when said shots were set off, there were three ordinary mining shots as affiant believes, and affiant says that the covering over said winze was not disturbed or blown up, and that the trap-door over the same was not thrown open, although it was not held down except by its weight, and that affiant and the other workmen with his were at a distance which made it perfectly safe for them in any case of any ordinary mining shot or shots being let off in the bottom of said winze, as affiant believes, and affiant further says that almost immediately after said three shots were let off in said winze by the Enterprise Mining Company a strong smoke and smudge containing sulphur and pepper or some other disagreeable and noxious substance came up out of said winze and that affiant is informed and believes that his workmen placed several thicknesses of canvass over the top of said covering over said winze, and put dirt and rock around the edges of said canvass (while affiant was temporarily absent from said winze for a space of about eight or ten minutes) in order to keep out the smoke; that soon after said first three shots herein mentioned had been fired in the bottom of said winze, the superintendent, Lee S. Wood, and day foreman on said mine, James H. Bishop and other workmen of the Rico-Aspen Consolidated Mining Company prepared to drive back such smoke by extending the air pipe from upraise No. 3 back to or near said winze; and affiant says, that between eleven and twelve o'clock on said night, and while he was temporarily absent from said point and place in the Vestal workings, and while he had gone out of said mine to the surface, he is informed and believes that a terrific explosion took place in the bottom of said winze and that said explosion was not such an explosion or shot as would be caused in any ordinary mining, and affiant does not believe that any hole had been driven or drilled in which to put any mining shot after said three shots first mentioned had been set off in said winze; and affiant is informed and believes that at the time said explosion occurred

in the bottom of said winze that Lee S. Wood, superintendent of said property and James H. Bishop, day foreman thereon, together with others, were endeavoring to extend and
93 connect the air pipe in said level and drift from upraise No. 3 a distance of about 30 feet from the top — said winze, and that when explosion occurred Lee S. Wood aforesaid was thrown down and seriously injured and that the other workmen were seriously shocked and blown against the side of said drift by such explosion; and affiant further says that he went down into said mine immediately after said explosion occurred, and affiant is informed and believes that by said explosion the covering and bulkhead over said winze was blown off and demolished. And affiant further says that almost immediately after said explosion a strong draft of dense smoke was driven up through said winze by the Enterprise Mining Company, and that said smoke was charged with sulphur and pepper, as affiant believes, or with some other noxious material, and that by said smoke affiant and his workmen were driven out of said drift and workings, and that a strong draft of said smoke was forced through said workings from said winze from the time of said explosion until 6 o'clock of the morning of September 2d, 1892, and that during all of said time the same was so strong that it was impossible to go into said workings, and affiant is informed and believes that said smoke continued from the time he quit work on the morning of September 2d, 1892, and that during all of said night the same was so strong that it was impossible to go into said workings, and affiant is informed and believes that said smoke continued from the time he quit work at six o'clock in the morning of the 2d of September, 1892, until 6 o'clock p. m. of said day, when he went — said mine again for the purpose of going to work.

And affiant says, that at six o'clock p. m. of the said 2d day of September, 1892, the smoke was not so strong as on the previous night, but that it was sufficient to keep affiant and his workmen more than one hundred feet away from said winze in said mine, and that no work could be done in said mine in any of the upraises or upon any of the ore bodies developed and opened up within the Vestal Lode mining claim at said time; and that about nine o'clock of said evening the said smoke became more dense, and the heat from the same was as great as it had been at any time previous, to the knowledge of affiant, but affiant cannot say that there was any sulphur or other noxious material in said smoke at that time; and affiant says that said smoke continued from 9 o'clock on the night of September 2d 1892 to be very dense and strong and to be driven up through said winze, until about three or four o'clock of the morning of September 3d, 1892.

And affiant is informed and believes that the smoke continued on said mine from the morning of September 3d, 1892, until the
94 evening of said day, when affiant went back to work in said mine and found the smoke and heat from the same very strong and found it impossible to go into said mine to upraise No. 3 aforesaid, or to the winze aforesaid, or within 150 feet of the same; and affiant says that about 9 o'clock on the night of September 3d,

1892, in going through the cross-cut and level driven in the Vestal claim to said upraise No. 3, and to said winze, he encountered a cave in said drift, and that at said point (being a distance of about 150 feet from said winze) the timbers for a distance of about forty feet had been either knocked down or demolished, and that the cave had been caused from the roof and sides of said drift in such a manner that sufficient rock had been knocked down and had fallen to fill up said drift and level for said distance with rock to a depth of five or six feet from the floor thereof.

And affiant further says that a portion of a box of giant powder together with a portion of a box of caps, were stored at said point in said mine before the explosion occurred in said winze on the night of September 1st, 1892, and that affiant does not know whether said cave and breaking down of said timbers was caused by the explosion of said powder so stored at that point, or how the same was exploded or caused; and affiant further says, that at upraise No. 3 in said level and drift (being the point at which said cross-cut, level or drift cut said vertical or fissure vein, and being situated about 33 feet from the winze in which said explosion occurred) it was discovered by himself and his workmen on the morning of the 4th of September, 1892, at about 1 o'clock a. m. of the aforesaid day (being the earliest time at which they were able to go to said point on account of the smoke and heat), that said upraise and the timbers and planks in the same had been burned out for a distance of about 12 feet from the top of said drift, and affiant and his workmen put out the fire which remained burning at said time.

And affiant further says that at the time said explosion occurred in said winze there were no timbers or wood in said winze or about the claim, save and except the covering over the same, as hereinbefore stated, unless said timber or wood were placed in the same from below and by the Enterprise Mining Company; and affiant believes that from the smoke and fumes, and from the fire in upraise No. 3 and from the heat throughout said Vestal workings, that the Enterprise Mining Company built and maintained in the bottom of said winze a large fire, and consumed during said time several cords of wood, and besides the sulphur and other noxious materials, and that the walls of the drifts and workings in said Vestal mine for a distance of more than 200 feet away from said winze, on the
95 morning of the 4th of September, 1892, were hot; and that affiant and his workmen were only enabled to go into said workings so early on the morning of September 4th, 1892, by reason of the presence of water which had risen in said drift.

And affiant further says, that since said fire in said winze Thomas Kane, foreman of the Enterprise Mining Company on said work, informed him that there was no pepper put in said fire in said winze, and that the only thing they did put in said fire was sulphur and oil when they started the same; and further affiant saith not.

(Signed) FRANK WYMAN.

Subscribed and sworn to before me this 14th day of September, 1892.

WILLIAM B. HESS,
Notary Public.

My commission expires May 6th, A. D. 1894.

UNITED STATES OF AMERICA, } ss:
District of Colorado, }

In the United States Circuit Court within and for the District of Colorado.

THE RICO-ASPEN CONSOLIDATED MINING COMPANY, a Corporation, and David Swickhimer, Laura D. Swickhimer, A. P. Adams, Washington S. Greene, John Kinkaid, A. O. Headley, Julius Thompson, and Frank W. Ingersoll, Plaintiffs,
vs.
THE ENTERPRISE MINING COMPANY, a Corporation, Defendant.

STATE OF COLORADO, } ss:
County of Dolores, }

M. N. Honeywell, being first duly sworn according to law, deposes and says; that he is a citizen of the United States over the age of thirty-four years and that he has been engaged in mining and mining operations and in the use of giant powder and mining explosives for more than nine years last past and that he has been engaged as a miner by the Rico-Aspen Consolidated Mining Company upon the "Vestal" Lode mining claim and the workings therein since June 16th, 1892, and that on the afternoon of September 1st, 1892, he was engaged in the level and drift in said "Vestal" mine where the same is run upon the vertical or fissure vein in said mine and where a certain winze is sunk in the end of said level and drift to a depth of 22 feet, and that about 3 o'clock of the afternoon of said day, the workmen of the Enterprise Mining Company who were drifting a certain drift and level upon said vein from
96 the line of the Jumbo Lode mining claim across the end lines and in and upon the "Vestal" Lode mining claim for a distance of eighty-seven feet within the lines of said "Vestal" Lode mining claim, extended downward vertically, broke into and made an opening from said level into the bottom of said winze on said vein.

And affiant further says that while said men were working in said level at the bottom of said winze for the Enterprise Company, affiant was stationed at the top of said winze on said day until about three o'clock in the evening and that after said workmen had broken through the bottom of said winze, affiant went down into said winze and notified the men engaged at work there, not to come any further that way, and the employés of the Enterprise Mining Company asked affiant what he said, and he again repeated to them what he said, viz: "Don't you come this way any further," and one of them

asked "Why not," and affiant answered "Because you are far enough this way now." And affiant heard one of said workmen say to his companion, "Jim they have stopped us."

And affiant further says that that was all of the conversation had with said workmen from the bottom of said winze on said vein up to three o'clock in the evening thereof, through the opening so made and that no threats or violence was used toward said *ow*rkmen in the employ of the Enterprise Mining Company.

And affiant further says that said winze was not timbered and contained no timbers, except the boards and covering from the same and the frame round the top or rim thereof, and that the level above said winze for a distance of more than thirty feet from the same was not timbered and there were no timbers or wood in said level for said distance from such winze as affiant believes except possibly a small amount of legging and this was daily removed by some of the workmen of the Rico-Aspen Consolidated Mining Company when affiant last saw it.

And affiant further says that he endeavored to go on day shift on the morning of the second and third of September, 1892, in said "Vestal" mine and that neither he nor any of the workmen or miners were able to go to work in any of the workings in said mine upon the ore bodies therein which had been opened up or developed on either of said days on account of the large amount of smoke and fumes which were coming up through said winze and into the workings of said "Vestal" mine.

97 And affiant further says that said smoke was, during a greater part of said time and the times at which he was at said mine, charged with sulphur or some other noxious material which rendered the same very offensive and made it impossible for any one to live in the same.

And affiant further says that on the morning of September 4th, 1892, at about seven o'clock of said day he went into the "Vestal" mine and discovered that a large amount of rock for a distance of forty or fifty feet along the cross-cut drift run from the shaft in said "Vestal" mine had been broken down from the roof and sides of said drift, and that the timbers for said distance, had either been thrown down or demolished and that said drift and level were filled with rock for said distance to a height of 5 or 6 feet from the floor thereof; and affiant found also that at upraise No. 3 (being the upraise run on said vertical vein or near the same, up to the contact or flat vein above and being about thirty or thirty-five feet from said winze) the timbers in the lower part of said upraise have been burned away and the timbers and plank forming said upraise for a distance of ten or twelve feet have been burned out.

And affiant further says that the covering was gone from said winze and that there was evidence on every hand that a large fire had been kept in said winze and in the drift and level on said "Vestal" mine above said winze.

And affiant says that — the said upraise No. 3 a large amount of rock had fallen and broken down from the roof and sides of said level and drift, and from the roof and sides of said upraise and that

said level was choked up and filled to a depth of several feet at said point with said rock.

And affiant further says that he is well acquainted with and knows the point at which said drift and level run upon said vein by the Enterprise Mining Company, crosses over and upon the Vestal Lode mining claim, as shown by the survey, and that said drift and level, is run in and upon said Vestal Lode mining claim for a distance of about 87 feet and that said fire was made and kept up by the Enterprise Mining Company, as affiant is informed and believes and that the same was within the surface lines and boundaries of the "Vestal" Lode mining claim extended downward vertically; and affiant believes that the Enterprise Mining Company at the time it drove said level, was fully advised and knew that it was running into the "Vestal" Lode mining claim and near or under the workings upon said "Vestal" mine.

And affiant further says that since said 4th day of September, 1892, James Dockerty, one of the workmen employed by the
98 Enterprise Mining Company, in said drift and level so run into the "Vestal" Lode mining claim, by the Enterprise Mining Company, informed and told affiant that he, Dockerty, was on guard and present when the hole was blown through into the bottom of said winze, and that he, Dockerty, would swear that he himself did not go up through said winze into the workings of said "Vestal" mine, which had been run by the Rico-Aspen Consolidated Mining Company, to set fire to any timbers or to do any damage in said workings or at all, and that the fire and heat was too great to have done so, and that the Enterprise Mining Company was drawing wood to said winze with which to keep up said fire with a mule.

And affiant further says that he believes that the timbers and rock in said cross-drift from the "Vestal" shaft, first above mentioned, were broken down by an explosion of a portion of a box of powder which was stored about said point in said drift for the use of the workmen of the Rico-Aspen Consolidated Mining Company, and that said explosion was caused by a great heat from said winze and from the timbers burning in said mine. And further affiant saith not.

(Signed) M. N. HONEYWELL.

Subscribed and sworn to before me this 15th day of September, A. D. 1892.

My commission expires May 6th, A. D. 1894.

WILLIAM B. HESS,
Notary Public.

UNITED STATES OF AMERICA, } ss:
District of Colorado, }

Affidavit.

In the United States Circuit Court within and for the District of Colorado.

THE RICO-ASPEN CONSOLIDATED MINING COMPANY, a Corporation, and David Swickhimer, Laura D. Swickhimer, A. P. Adams, Washington S. Greene, John Kinkaid, A. O. Headley, Julius Thompson, and Frank W. Ingersoll, Plaintiffs,
vs.
THE ENTERPRISE MINING COMPANY, a Corporation, Defendant.

Douglas L. V. Browne, being first duly sworn according to law, deposes and says that he is a mining engineer, and for more than twenty years last past has been actively engaged as such mining engineer in the working and operation of mining properties
99 in the United States of America and elsewhere, and that for more than four months last past he has been and now is general manager of the Rico-Aspen Consolidated Mining Company and all the properties in the Pioneer mining district, Dolores county, State of Colorado, and that he has charge as such general manager of the Vestal Lode mining claim and of the workings upon the same, which is owned and operated by the plaintiffs in the above-entitled action, and that he is familiar with the workings in said mine, and all of drifts, levels, stopes, winzes, shafts, upraises and ore chutes in the same, and within the surface lines of said claim extended down vertically; and that the defendant in the above-entitled action, to wit, The Enterprise Mining Company, its agents, servants and employés, drove a drift and level upon a certain lode mining claim known as the Jumbo Lode mining claim which extended on its strike and course from the Jumbo Lode mining claim claimed by said Enterprise Mining Company through the side line of said Jumbo Lode mining claim, and across the eastern end line of the Vestal Lode mining claim into the Vestal Lode mining claim and the surface boundaries thereof extended downward vertically, and upon said vein, for a distance of 87½ feet, and that in running said drift and level upon said vein, the said Enterpris*ing* Mining Company took out and sold and disposed of and converted to its own use a large amount of ore, and ore of great value; and affiant believes that in running said drift and in the extraction of ore therefrom that the said Enterprise Mining Company took out at least $50,000 worth of ore from within the surface boundaries of the said Vestal Lode mining claim, and that said ore belonged to and was the property of the plaintiffs herein, and that the Enterprise Mining Company had no right or authority to take or remove the same.

And affiant further says that the said Enterprise Mining Company, by its agents, servants and employés, also crossed over from the side line of the Jumbo Lode mining claim on it, and within the

surface boundaries of the Vestal Lode mining claim, extended downward vertically, upon the lode or vein in said Vestal Lode mining claim, known and called the flat vein or contact vein in said premises, and which lies above the drift so run in said premises by the Enterprise Mining Company, and above the vertical vein upon which said drift is run, and that said Enterprise Mining Company run in and upon said flat vein within the surface boundaries of the Vestal Lode mining claim extended downward vertically, with a drift about five feet in width for a distance of more than 30 feet, and that in running said drift said company took out, removed and disposed of a large amount of rich ore, of the value, as affiant is
100 informed and believes, of $50,000; and affiant is informed and believes that said ore was worth on an average of $900 per ton.

And affiant further says that all of said ore within the surface boundaries of said Vestal Lode mining claim, extended downward vertically, belonged to and was the property of the plaintiffs herein, and defendant had no right or authority to take or remove the same or any part thereof; and affiant further says that on or about the first day of August, 1892, Daniel L. Kirby, the superintendent in charge of the workings and operations being carried on by the Enterprise Mining Company in said county and State, declared to affiant that the mineral in the vein known and called the Jumbo vein, within the surface boundaries of the Vestal Lode mining claim, extended downward vertically, belonged to the Enterprise Mining Company, and that said company intended to claim the same, and affiant is informed and believes during all the time the said Enterprise Mining Company has been engaged in running said drift and level in and upon the Vestal Lode mining claim, its officers, agents, servants and employés were fully advised that they were within the surface boundaries of said Vestal Lode mining claim, extended downward vertically, and that they knew full well that they were taking, removing and disposing of the ores belonging to the plaintiffs, and that the officers and agents and employés of said company denied and continued to deny until about the first day of September, 1892, that they had crossed in and upon said Vestal Lode Mining claim, or within the lines thereof, extended downward vertically, and falsely and fraudulently pretended that they had not done so in order to mislead the affiant as the representative of the plaintiffs herein, and in order to fraudulently, secretly and designedly remove and dispose of the ores belonging to the plaintiffs herein from within the boundary lines of said Vestal Lode mining claim.

And affiant further says that by agreement between the officers and agents of The Rico-Aspen Consolidated Mining Company, plaintiff herein, and the officers and agents of the defendant, The Enterprise Mining Company, made on or about the 26th day of August, 1892, a joint survey of said premises and the drift and level run in and upon the said Jumbo vein, and in and upon the flat or contact vein from the Jumbo Lode mining claim into the Vestal Lode mining claim, and within the surface boundaries thereof extended downward vertically, was had, and that such survey was completed on

the 30th day of August, 1892, and that after such joint survey was had, and the defendant company had become fully advised of the fact that it was within the lines of the said Vestal Lode
101 mining claim, it came in and upon said lode mining claim in the breast of said drift and level run by it, at a point 87½ feet from the end line of the Vestal Lode mining claim, and by means of blasts and fire drove out the workmen and employés of the plaintiff company engaged in the drift and level and workings in said Vestal mining claim above said level so run by the Enterprise Mining Company, and that fire, smoke and noxious fumes prevented the plaintiff company's agents and employés from remaining in said mine or any part thereof, and said defendant company, by its agents and employés, ascended into the workings, levels, drifts and upraises which had been in the possession and which had been run within the lines of said Vestal Lode mining claim by the plaintiff company, and started and built fires in the stations and upraises and timbers in said workings, and exploded large amounts of giant powder, and held possession of said premises from 12 o'clock at night of September 1st, 1892, until about the hour of one o'clock a. m. September 4th, 1892, and that during said time the defendant company maliciously and *wrecklessly* burned and destroyed the timbers and workings aforesaid, and knocked down and broke down large quantities of rock and *earth* in said mine, and by means thereof damaged plaintiffs in the sum of $5,000, as affiant believes; that in setting off said blasts in such workings and in building said fires in the same, and maintaining them, and in burning out the green timbers in said mine and workings so made in the said Vestal Lode mining claim, and in wrecking and demolishing the air pipe, ladders, upraises and ore chutes in said premises, both in and upon said vertical vein in said premises, and at other points remote therefrom, the defendant and its agents, servants and employés exhibited an utter disregard for the rights of the plaintiffs, and for human life or the preservation of property.

And affiant further says that vertical or fissure vein crosses in and upon the Vestal Lode mining claim, as shown in all of said workings, upon its strike, and passed out of the Jumbo Lode mining claim, claimed by the defendant herein, through the side line of said Jumbo Lode mining claim; and that the said flat or contact vein continues from the said Jumbo Lode mining claim and from the side line thereof into the Vestal Lode mining claim, with a dip upward, and that neither the Jumbo Lode mining claim nor any claim owned by the defendant has the apex of said flat or contact vein, and that the apex of said flat or contact vein is within the surface boundaries of the Vestal Lode mining claim, extended downward vertically, as affiant believes, and the dip of said vein is downward, and into the Jumbo Lode mining claim as aforesaid; and further affiant saith not.

DOUGLAS L. V. BROWNE.

102 UNITED STATES OF AMERICA, }
District of Colorado, } ss:

Affidavit.

In the United States Circuit Court within and for the District of Colorado.

THE RICO-ASPEN CONSOLIDATED MINING COMPANY, a Corporation, and David Swickhimer, Laura D. Swickhimer, A. P. Adams, Washington S. Greene, John Kinkaid, A. O. Headley, Julius Thompson, and Frank W. Ingersoll, Plaintiffs,
vs.
THE ENTERPRISE MINING COMPANY, a Corporation, Defendant.

STATE OF COLORADO, }
County of Dolores, } ss:

Lee S. Wood, being first duly sworn according to law deposes and says that he is a citizen of the United States, over the age of twenty-one years, and that he has been actively engaged in mining and in prospecting for mineral-bearing mines and veins for more than sixteen years last past, and that he has been engaged by the Rico-Aspen Consolidated Mining Company as superintendent of its works and operations in the Pioneer mountain district, in Dolores county, State of Colorado, ever since April, 1892, to the present time, and that as such superintendent he has had general charge of the workings and operations upon the "Vestal" Lode mining claim situated to the eastward of the Jumbo Lode mining claim, operated by the Enterprise Mining Company, on Newman hill in said mining district county and State, and has had charge of the workings and operations carried on by his said company upon the Old Discovery Lode mining claim situated directly west of the said Jumbo Lode mining claim, and of the workings of said Old Discovery Lode mining claim and in connection therewith, commonly known as the "Montezuma" workings; and affiant says that within the boundary lines of the said Vestal Lode mining claim, extended downward vertically, the Rico-Aspen Consolidated Mining Company had cut a certain vertical vein or ore chute or spur, standing substantially vertical and had run along the same a distance of more than 50 feet on the first day of September, 1892, and had made an upraise upon said vertical ore body and put in an ore shute upon the same from the point at which the same was discovered within said Vestal Lode mining claim up to the contact or flat vein and ore body overlying said vertical or upright ore body or chute for a distance of about 40 feet, and that said upraise was known and desig-
103 nated in said Vestal mine as upraise No. 3, and that at a distance of about 33 feet from said upraise No. 3, and along the said vertical vein or ore chute in a westerly direction, and at the end of the drift and level run upon the same by the Rico-Aspen Consolidated Mining Company, said company had previous to said day sunk a certain winze to a depth of about 22 feet, for the purpose of

determining whether the Enterprise Mining Company was driving in and upon said vertical vein or ore chute within the boundary lines of said Vestal Lode mining claim, extended downward vertically, and under the point at which said winze was driven.

And affiant further says that on the afternoon of September 1st, 1892, the Enterprise Mining Company, by its workmen broke into the bottom of said winze, and affiant caused said winze to be covered with boards in order that any smoke from the work so being carried on by the Enterprise Mining Company within said Vestal Lode mining claim might be kept out and excluded from the workings carried on by affiant and his workmen upon the Vestal Lode mining claim; and affiant says that between 10 and 11 o'clock on the night of the first day of September, 1892, his workmen were driven out of said drift in the Vestal Lode mining claim near said winze by smoke and gas and fumes which were being driven up from the bottom of said winze by the Enterprise Mining Company through the covering over the same, and into the workings upon the Vestal Lode mining claim, and that affiant went down into said mine and caused said winze to be more securely covered by means of canvass over the same, and by throwing dirt and rock upon said canvass and around the edges thereof, and was preparing to furnish fresh air to his workmen in said portion of the Vestal mine, and was extending the air pipe from a point near the upraise No. 3 back toward the said winze in the breast of said level, with the aid and assistance of James H. Bishop, one of his foremen, and other men, between the hours of 11 & 12 o'clock of said night, when he was informed that the workmen of the Enterprise Mining Company had given notice that they were about to fire a mining shot in the bottom of said winze; and affiant says that he and his workmen were at a distance of about 35 feet from the bottom of said winze at the time, and while they were at said distance, (the same being a perfectly safe distance in case of the firing of any ordinary mining shots in said winze) a terrific explosion took place in said winze, which affiant does not believe was caused by any mining shot or mining blast, but affiant believes that said shot was made and caused and such explosion was caused by the Enterprise Mining Company placing a large amount of powder loose in the bottom of said
104 winze, and letting it off in order to blow the covering off of said winze, and to smoke and drive affiant and his workmen out of said Vestal workings and out of the workings in said Vestal mine.

And affiant further says that the said explosion so made in said winze threw him violently to the ground, and severely cut and injured his eyes, face and scalp, and tore a portion of his clothing from his person; and affiant further says that such explosion must have thrown the covering off of said winze, and affiant further says that his workmen and friends were obliged to conduct him and aid and assist him in getting out of said vein, and that he was completely blinded for several days on account of said injuries, and that he was not able to return and did not return to said mine for several days thereafter; affiant further says that for several years last

past he has been familiar with the character of the ore bodies and veins in the Pioneer mining district, Dolores county and State of Colorado, and more especially with the ore bodies upon Newman hill, where the said Vestal Lode mining claim and said Discovery Lode mining claims are situated, in said mining district, county and State, and that the ore bodies in said claims and in all the other claims upon said Newman hill with which affiant is familiar, consist of certain bodies of ore lying substantially flat or horizontal in the contact between shale for a roof, and gray lime for a floor, and of certain vertical, or substantially vertical veins or ore chutes which extend downward below said contact vein, cutting the underlying formation at substantially a right angle; and affiant further says that said contact or flat veins or ore bodies are connected with all of said vertical veins or ore chutes and with the ore bodies therein, by means of a series of inlets or small quartz veins running for a distance of an average of about six feet from the valuable ore bodies in the contact veins and the pay ore in the so-called vertical veins, and further affiant says that the said small veins of quartz so connecting said two ore bodies or veins are practically barren, they are still more or less mineralized; and affiant says that this is the condition of the connection between the so-called vertical vein and the so-called contact or flat vein overlying the same at the point in the Vestal mine herein described as upraise No. 5, and at all other points where said connection is disclosed in any mining properties upon said Newman hill, which affiant has examined; and affiant has examined and seen these connections in various properties on said Newman hill, including among others the Jumbo Lode mining claim aforesaid; and that said vertical veins or spurs are on said Newman hill of frequent occurrence, and are quite familiar in character and appearance: and that said vertical veins or shoots, and said contact or flat veins, are not, in the opinion of affiant, separate and distinct and independent veins, but that they are in truth and fact but portions of the same and one vein and ore body.

And affiant says that he is familiar with the vertical vein or ore chute upon which said winze was sunk by his said company, and along which the said company ran said level for a distance of more than 50 feet, and upon which the Enterprise Mining Company ran its level into the Vestal Lode mining claim, and that he believes the said so-called vertical vein and ore chute, and the overlying contact or flat vein form but one vein and ore body at said point, and at all points within said Vestal Lode mining claim, and that at all places at which said vertical or upright veins or ore chutes occur upon said Newman hill, such veins are nothing more or less than spurs or offshoots from the main vein, or flat contact, therein overlying the same, and affiant says that the ore in said contact vein is usually much higher in grade than that in said vertical veins, and that such vertical veins have, according to his experience and observation of the same, proven barren and worthless beyond 50 or 60 feet downward below such contact or flat vein overlying the same; and affiant further says that he is familiar with the

course and direction of said vein as disclosed along and throughout all of the workings upon the same in the Vestal Lode mining claim, in the Jumbo Lode mining claim, and in the Old Discovery Lode mining claim for a distance of about 600 feet, and that he is also familiar with the course and direction and location of the Group tunnel or Group tunnel site and location, owned and operated by the Enterprise Mining Company, and that he knows the point at which the location of the Jumbo No. 2 Lode mining claim is set up on the line of said Group tunnel location, and affiant believes that from the course and direction of said vein as disclosed in said three lode mining claims aforesaid, that if said vein continued upon its general course as is shown in such workings, it would intersect and cross the line of said Group tunnel location at a point more than 200 feet ahead, and to the eastward of the point at which said location stake of the Jumbo No. 2 Lode mining claim has been set up on the line of said Group tunnel location; and affiant says that in order for said vein or ore chute to pass through and cross over the line of said Group tunnel location at the point at which said Jumbo No. 2 location stake is set up, said vein would have to make a decided curve and bend to the north.

And affiant further says that in the developments upon said vein in the Vestal mine running from the winze aforesaid in an easterly direction the course of said vein is shown to be more toward
106 the east than any other part of the same, so far as it has been developed, and were the course and direction of said vein for a distance of 125 feet along the same in such workings, and from the extreme eastern point of the mine so developed, taken as the true cours- and direction of said vein, and were said vein produced and continued upon said course, it would cut and cross over the line of said Group tunnel location at a point more than 500 feet -head and eastward from the discovery stake of the Jumbo No. 2 Lode mining claim, claimed by the Enterprise Mining Company; and affiant further says that the general course of the vertical veins or ore chutes from the contact vein upon said Newman hill, is substantially northeast and southwest, and that the vein and ore chute in question and upon which said winze was run, runs more nearly east and west than any of the other veins with which affiant is acquainted or familiar upon said Newman hill.

And affiant further says that he has developed and cut the same vertical vein upon which said winze was run in the Vestal Lode mining claim in the Old Discovery Lode mining claim, on the eastern side of the Jumbo Lode mining claim for the said The Rico-Aspen Consolidated Mining Company, and that the connection is made now the entire distance from said winze in the Vestal Lode mining claim to said point on the Old Discovery Lode mining claim where affiant as such superintendent has cut the same; and affiant says further that in running a cross-cut in the Old Discovery Lode mining claim for a distance of 250 feet to said point upon said vein so developed, and in running said cross-cut substantially at a right angle to said vein, four other veins running substantially parallel with the vertical vein aforesaid, were cut and developed, and that

all of said veins are well defined, mineral-bearing veins or ore chutes of the same kind and character as the vertical vein aforesaid, upon which said winze was sunk in the Vestal Lode mining claim, and in dispute in this case, and affiant says that the last vein cut in running said cross-cut before the vein in dispute was reached, is a much stronger and more valuable vein, or ore chute than the vein or ore chute in dispute in this case.

And affiant further says that if said four veins continue in their direction to the eastward, or to the northeast, they cross and intersect the line of the Group tunnel at points nearer to the entrance of said tunnel than the point at which the vein in dispute in this case intersects the line of said tunnel; and affiant further says that if any vein or lode has been cut in said Group tunnel at a distance of 1,920 feet from the entrance thereof, or at the point at which it is claimed by the Enterprise Mining Company the Jumbo No.
107 2 Lode mining claim and vein was discovered, it cannot be definitely determined what vein has been encountered in such tunnel until the same is fully developed and the connection is made upon the same in its course from said tunnel in a southwest direction with other workings in which said vein is shown; and affiant further says that if any vein has been discovered at said point in said tunnel, one of the veins hereinbefore mentioned as having been discovered in the Old Discovery Lode mining claim, may be said vein, but affiant does not believe from his knowledge of said country, or the character of said vein, or from his experience in mining upon said Newman hill, that the vein in dispute in this case can possibly be the same one discovered in said tunnel at the point at which the discovery stake of said Jumbo No. 2 Lode mining claim has been set up.

And affiant further says that in running the said cross-cut in the said Vestal Lode mining claim from the shaft in said claim, the vertical vein or ore chute in dispute in this case was cut and encountered in said upraise No. 3 in said mine on the 25th day of July, 1892, and that immediately thereafter upraise No. 3 was begun, and that the same was finished within ten days thereafter, and the upraise and connection between said level and between said vertical vein, or ore chute and said contact or flat vein was made; and further affiant saith not.

LEE S. WOOD.

Subscribed and sworn to before me this 17th day of September, A. D. 1892.

WILLIAM B. HESS,
Notary Public.

My commission expires May 6th, A. D. 1894.

UNITED STATES OF AMERICA, }
District of Colorado, } ss:

In the United States Circuit Court within and for the District of Colorado.

THE RICO-ASPEN CONSOLIDATED MINING COMPANY, a Corporation, and David Swickhimer, Laura D. Swickhimer, A. P. Adams, Washington S. Greene, John Kinkaid, A. O. Headley, Julius Thompson, and Frank W. Ingersoll, Plaintiffs,
vs.
THE ENTERPRISE MINING COMPANY, a Corporation, Defendant.

STATE OF COLORADO, }
County of Dolores, } ss:

Max Boehmer being first duly sworn according to law de-
108 poses and says: That he is a citizen of the United States of lawful age, and that he is a civil and mining engineer, and that he has practiced that profession for the last twenty-two years; that he is acquainted with the ground in controversy in this case the Vestal Lode mining claim. That at several times since August 26th, 1892, he has surveyed and examined the ground in controversy and the surrounding mining claims, together with all the underground workings of importance in this case; that he has also examined the geology of the mountain, and the veins cut by the workings, and that the results of his survey are embodied in the map attached thereto, and that the said map correctly represents the relative position of the workings and of the veins cut by said workings; that the workings made by the Rico-Aspen Consolidated Mining Company on the Vestal Lode mining claim are presented in green colors and that the same company's workings from the Montezuma shaft are represented in yellow colors and the defendant's workings all in red colors. That his survey shows that the Jumbo level followin- the Jumbo vein has entered the Vestal Lode mining claim on its west end line, and penetrated said lode mining claim to a distance of ninety feet connecting winze "A" 20 feet deep and sunk by the plaintiffs in the above-entitled action. That above said Jumbo level at a height of about fifty feet there are workings made by the Enterprise Mining Company from raise "B" which workings follow a certain geological horizon containing ore; that in these drifts also the defendant has entered the Vestal Lode mining claim to a distance of thirty-five feet and that the defendant has removed ore from these drifts as well as from the main Jumbo level spoken of above.

And affiant further says that he has correctly represented on the map a large number of veins crossed by the workings, and that all these veins are more or less vertical and that they consist of two systems, a northeasterly system and a northwesterly system; that the northeasterly system as a rule comprises the valuable veins and that the northwesterly system as a rule consists of veins of little or no

economical value; that the northwesterly veins are later in origin and that they frequently "fault" the northeasterly vein and that by reason of such faults it is difficult to determine the correct longitudinal direction of the northeasterly veins, beyond the actual development.

And affiant further says that he has represented these veins correctly, according to their size in red lines on the map, and that by reference to this map it will be seen that at present it is impossible for any one to determine whether the Jumbo vein opened in the Vestal workings is the same vein that has been discovered near the breast of the Group tunnel, and marked on the map the 109 & 110 tunnel vein. That it is possible that vein "A" in the Montezuma cross-cut and vein "B" in the Jumbo cross-cut and the tunnel vein are one and the same vein, and that the Jumbo vein in the Vestal workings may cease to exist on its strike before meeting the tunnel vein. It is also possible that the tunnel vein and the Jumbo vein at some point cross each other, and it is also possible that the tunnel vein may continue in its own present direction, and that the Jumbo vein ends against it, or that the tunnel vein ends against the Jumbo vein.

And affiant further says that the tunnel vein in its characteristics and size resembles more nearly vein "A" in the Montezuma cross-cut than the Jumbo vein in the Vestal workings, although vein "B" in the Jumbo cross-cut in its characteristics differs widely from those of the tunnel vein and vein "A" in the Montezuma cross-cut; that, however, in his opinion, such similarities or dissimilarities in the characteristics of the vein matter has little weight because veins in his experience vary their contents along their course and at different elevations.

In addition to this it will be seen by reference to the map that the Jumbo vein as developed in the Vestal, differs 40° in its course from the course of the tunnel vein as developed up to date and that the breast of both workings are still 400 feet apart.

From all these considerations affiant asserts that it is impossible to tell whether the tunnel vein and the Jumbo vein in the Vestal workings are one and the same vein; and affiant further says that the point of discovery of the tunnel vein which has been located under the name of the Jumbo No. 2 Lode mining claim, is situate within the boundaries of the Hiawatha Lode mining claim as shown on the map; and further affiant saith not.

(Signed) MAX BOEHMER.

Subscribed and sworn to before me this 17th day of September, 1892. My commission as a notary public will expire May 6th, A. D. 1894.

[NOTARIAL SEAL.] WILLIAM B. HESS,
Notary Public.

(Here follows map marked page 111.)

112 & 113 UNITED STATES OF AMERICA, } ss:
District of Colorado, }

In the United States Circuit Court within and for the District of Colorado.

THE RICO-ASPEN CONSOLIDATED MINING COMPANY, a Corporation, and David Swickhimer, Laura D. Swickhimer, and A. P. Adams, Washington S. Greene, John Kinkaid, A. O. Headley, Julius Thompson, and Frank W. Ingersoll, Plaintiffs,
vs.
THE ENTERPRISE MINING COMPANY, a Corporation, Defendant.

STATE OF COLORADO, } ss:
County of Dolores, }

J. P. Landon, being first duly sworn according to law, deposes and says; that he is a citizen of the United States over the age of twenty-one and a physician and surgeon by profession, and has been in active practice in said profession for a period of seventeen years; that he was called to attend Lee Wood, superintendant of properties of the Rico-Aspen Consolidated Mining Company on the morning of the 2nd day of September at the hour of 2 o'clock a. m., 1892; and that he found the said Lee Wood suffering to all appearances from a blast of giant powder; and affiant was informed that the injury of said Wood had been occasioned — a blast of powder exploded by the said Enterprise Mining Company, its agents or employés, in a winze situate in the Vestal Lode mining claim being one of the properties of the said Rico-Aspen Consolidated Mining Company and that the said Wood's eyes were swollen shut and that his face and scalp were in a badly lacerated condition and filled with particles of powder and small pieces of rock which were blown into them and still remained and it required surgical operations from time to time to remove said particles of rock from his eyeballs; that he had been in attendance upon said Wood from the time of such injury until the present date and that it has been necessary to keep him in a darkened room during such period and that his eyes are still badly inflamed, and that the said Lee Wood is still confined to his room by such injuries. And further affiant saith not.

(Signed) —— ——.

114 UNITED STATES OF AMERICA, } ss:
District of Colorado, }

In the Circuit Court of the United States within and for the District of Colorado.

THE RICO-ASPEN CONSOLIDATED MINING COMPANY, a Corporation, and David Swickhimer, Laura D. Swickhimer, A. P. Adams, Washington S. Greene, John Kinkaid, A. C. Headley, Julius Thompson, and Frank W. Ingersoll, Plaintiffs,
vs.
THE ENTERPRISE MINING COMPANY, a Corporation, Defendant.

STATE OF COLORADO, } ss:
Arapahoe County, }

Albert B. Roeder, being duly sworn, deposes and says: That he is the treasurer of the Rico-Aspen Consolidated Mining Company, and resides at Rico, Colorado. That he is acquainted with David H. Moffat, Eben Smith, Oliver P. Posey and George Crawford. That he was present at the certain interview between all of these parties, held on August 19th, 1892, at the office of Mr. Moffat, in the First National Bank of Denver. That at this interview the Enterprise Mining Company, and more particularly Mr. George Crawford, was accused of mining on the ground of the Rico-Aspen Consolidated Mining Company. That the said Crawford denied positively, and produced certain maps to prove that the Enterprise Mining Company had ceased mining when they reached the side line of the Jumbo claim, and the said George Crawford positively stated that the map which he produced was a recent one, and but a few days old, and that the said map was made by Mr. Hunt of Rico, and was correct.

Deponent further states that on behalf of the Rico-Aspen Consolidated Mining Company, Messrs. Moffat, Smith and deponent were not satisfied that said maps were correct, and asked and insisted that a joint survey be made to prove the statements of said Crawford. That said Crawford thereupon objected to having such survey made, because it was questioning his veracity, and he pledged his word of honor that they were not beyond the side line of the Jumbo mining claim.

Deponent further states that Mr. Posey repeatedly stated that he did not believe that the Enterprise Mining Company were beyond the side lines of the Jumbo, and that if they were they were there without his knowledge.

115 Deponent further states that during the entire interview it was repeatedly stated by both Crawford and Posey that the map produced by them showing the workings of the Enterprise Mining Company was a very recent one, and had been brought up to the previous day of the conversation, and that throughout the entire conversation reference was made to this new Enterprise map, and said Crawford and Posey did not state the map was one show-

ing the previous workings of the Enterprise Company, but their entire denial was to the effect that they were not at the time of the conversation over the side lines of the Jumbo claim, and expressed no right so to do.

Deponent further states that he was informed when he was at Rico the following week, by the surveyors of the Rico-Aspen Consolidated Mining Company, that contrary to the statements of said Crawford and Posey, the Enterprise Mining Company were mining over eighty-five feet beyond the side lines of the said Jumbo mining claim.

And affiant further saith, that he makes this affidavit from his personal recollection of said conversation without having his memory refreshed by the affidavit of any one, or of the statement of any one concerning the same, and that he has not had any conversation *and* the said D. H. Moffat, or any one else who was present at said conversation, and that he has not seen or read the affidavit of D. H. Moffat made in this case, and does not know what is contained therein, and that he has not seen or read the affidavit of any one else concerning such conversation, except the affidavit of Oliver P. Posey.

And further affiant saith not.

(Signed) A. B. ROEDER.

[SEAL.] Subscribed and sworn to before me this 20th day of September, 1892.

ALBERT SMITH,
Notary Public.

My commission as a notary public will expire May 7th, 1893.

116 UNITED STATES OF AMERICA, } ss:
District of Colorado, }

Affidavit.

In the Circuit Court of the United States within and for the District of Colorado.

THE RICO-ASPEN CONSOLIDATED MINING COMPANY, a Corporation, Plaintiff,
vs.
THE ENTERPRISE MINING COMPANY, a Corporation, Defendant.

STATE OF COLORADO, } ss:
County of Dolores, }

Herbert L. W. Way, of lawful age, being first duly sworn according to law, deposes and says: That he is a civil engineer and surveyor and that he is well acquainted with the Jumbo Lode mining claim, being operated by the defendant company, in the above-entitled action, and with the Old Discovery Lode mining claim, owned and operated by the plaintiff in the above-entitled action,

both said claims being situate on the western slope of Dolores mountain in the Pioneer mining district, Dolores county, Colorado.

And affiant further says that he assisted W. F. Carhart in surveying and running out the line between the Old Discovery Lode mining claim and the said Jumbo Lode mining claim and that said claims adjoin each other and that said Old Discovery Lode mining claim adjoins the Jumbo Lode claim on the western side of the said Jumbo claim and is lower down the hill and underneath said Jumbo Lode claim.

And affiant further says that the defendant, The Enterprise Mining Company and its grantors, have raised and placed upon the surface of said Jumbo Lode mining claim and upon the surface of the Old Discovery Lode mining claim a large dump of earth and rock and waste and that the said dump extended over and upon the Discovery Lode mining claim for a distance of 35 feet more or less from the eastern side line of said Old Discovery Lode mining claim, and for a distance along said line of 300 feet more or less, and that the track upon which rock and earth is being run out at the present time, is laid in such a manner that the said Enterprising Mining Company holding and operating said Jumbo Lode mining claim is dumping from said track, rock and earth taken and raised from said Jumbo Lode mining claim, and that such rock and earth so dumped by said defendant company runs down and upon and over the said Old Discovery Lode mining claim and the surface
117 ground thereof and that such rock and earth so dumped by said defendant, runs down and upon the wagon road upon said Old Discovery Lode mining claim used by the complainant company to the great detriment and damage of the said complainant.

And further affiant saith not.

(Signed) HERBERT W. L. WAY.

Subscribed and sworn to before me this 7th day of October, 1892.

BEN. H. PELTON,
Notary Public.

My commission expires June 8th, 1896.

UNITED STATES OF AMERICA, } ss:
District of Colorado, }

In the District Court of the United States for said District.

THE RICO-ASPEN CONSOLIDATED MINING COMPANY, Plaintiff, }
vs.
THE ENTERPRISE MINING COMPANY, Defendant. }

L. S. Wood, being first duly sworn on oath according to law, deposes and says that he is the superintendent of the mines now being worked and controlled by the said plaintiff, that he is well acquainted with the ground in controversy between said plaintiff and said defendant, and is also well acquainted with the vein on which defendant was ordered by said court to prosecute work through the

Vestal and Contention Lode mining claims; that defendant is now prosecuting such work and is extracting large quantities of rich ore therefrom; that the ore so extracted from the said vein is transported by defendant underground for a distance of more than two thousand feet from the place of its extraction to the place of storage and is carried through the Group tunnel which lies exclusively upon defendant's own ground and through which the defendant transports large quantities of rich ore and of different grades of richness and from the different claims owned by defendant and worked through said tunnel.

The deponent has been appointed by said court an inspector to look after and watch the development of said vein in said Vestal and Contention Lode claims, and to watch the extraction and transportation of ores therefrom and to generally look after the interests of plaintiffs. That thus far one H. W. L. Way, also appointed by said court an inspector with like duties, has been watching the work done on said vein by defendant and has been endeavoring to keep track of the ore. That deponent is informed
118 and believes that defendant has continuously refused to the said Way the privilege of passing through said Group tunnel.

Deponent further says that it is impossible for any one to identify the ore extracted from said vein without his having the privilege of following such ore from the point of its extraction to the place of its storage for the reason that defendant is transporting through said Group tunnel large quantities of ore which might be changed for the ore taken from said vein unless such ore should be sacked in the mine where extracted by said plaintiff or some one for it should be allowed to seal said sacks in the mine; that the only protection for said plaintiff in this regard would be in requiring the defendant to sack said ore as aforesaid and to permit some disinterested party to seal all such sacks and that plaintiff be allowed to keep a record of such seals and sacks.

E. S. WOOD.

Sworn to before me and subscribed in my presence this 12th day of October, A. D. 1892.

BEN. H. PITTON,
Notary Public.

My commission expires June 8, 1896.

UNITED STATES OF AMERICA, }
District of Colorado, } *ss:*

In the United States Circuit Court within and for the District of Colorado.

THE RICO-ASPEN CONSOLIDATED MINING COMPANY *et al.*, Plaintiffs, }
vs.
THE ENTERPRISE MINING COMPANY, Defendant. }

Before me, the subscriber, a notary public within and for said county, personally appeared David Swickhimer, of lawful age, who

being first duly sworn, says that he has lived at Rico, Colorado, and mined on Newman hill from the year 1880 to the year 1892; that he kept himself familiar during all that time with the principal discoveries, locations and developments on that hill, and was largely interested in the same.

That a certain ore-bearing contact underlies the hill generally; whether in branches or a continuous contact the developments are perhaps not sufficient to demonstrate; but affiant believes to be practically continuous. This contact was known as early as the year 1880; it outcrops at one or two points in Deadwood gulch, and more particularly in groundwork in 1880 or 1881 by S. M. Ransom and others and called by them at that time, as affiant recol-
119 lects, "The Carbonate Springs lode." It was afterwards cut as early as January 1st, 1885, in the Newman and "Swansea" workings, where they worked on verticals up to the contact, and by drifting when they got up to the contact on either side of the vertical vein.

A shaft also called the "Camp Bird" or the "Song Bird" had been sunk over 200 feet about 1881 or 1882, which had cut into contact. The affiant himself, in March, 1887, began continuing the shaft now known as the Enterprise, which was then about 147 feet deep, and had been sunk in 1882, or 1883. Affiant kept at work from March, 1887, and struck the contact as early as the 15th day of July of that year, where it showed some mineral, but did not strike a heavy body of continuous mineral until the 6th day of October.

The fact that the contact existed and that it carried mineral and that pay mineral had been taken from it at various points prior to 1886, was a matter of common notoriety, but the first big strike, as it is commonly called, was made by affiant himself in the Enterprise shaft in October, 1887.

After striking the contact in said shaft affiant kept at work continuously in that shaft until 1890; and during that period made extensive drifts and stopes on the contact; in general terms he drifted to the northeast 400 feet, south 700 feet, west at least 200 feet, and various distances, in intermediate directions so as to work out an area of about 6 acres by a network of drifts and stopes. In all these drifts and stopes the contact was found to be continuously ore-bearing, but only about one-fourth of it was pay ore, and that the stoping was confined to these chutes, which contained the pay ore. These chutes of pay ore had not, in affiant's belief any parallel or regular course, neither did they follow the course of the pay verticals, but apparently ran at an angle to the course of the pay verticals, not in all cases, but that was the general rule. Affiant does not know and cannot say whether the ore originally came from the verticals or the contact, but he does say that his workings justified the belief that the contact, without regard to any intersecting veins formed a continuous body of ore-bearing matter which would pay for working from point to point without regard to the finding of ore in the verticals.

Affiant says that early in the year 1891 he was an owner in the

Vestal group, including the Vestal lode; that the Vestal shaft at that time had been sunk to contact, when in August, 1891, affiant was put in charge. The same flat vein found in the Enterprise, as affiant verily believes, had been cut through in the Vestal
120 shaft, and affiant drifted underneath it south over 60 feet, when he cut it again on its dip and then followed it about 60 or 70 feet, making over 120 feet of drifting from the shaft. The object in working under the contact was to be able to stope the contact when cut, and to prospect the ground for vertical veins. We also drifted north from the shaft 150 or 160 feet; we did not find any pay ore in these drifts, but we had the ore-bearing flat vein which in the same workings through the same drift has been extensively worked and stoped. Affiant says that this contact in many places in the "Enterprise," the "Vestal" and other workings is reached from below by vertical veins which lose themselves in the contact when they strike its floor. Affiant further says that comparing the ore value of the verticals below the contact with the ore value of the contact itself, the rich ore as a rule was found in the contact, but large bodies of ore were found in both without any seeming connection or relation between them. The contact ore averages the higher grade; it would — from 300 to 700 ounces silver and five or six ounces of gold, where the vertical would run from 100 to 300 ounces of silver, about one ounce of gold to every 100 ounces of silver.

The pay in the verticals seem to disappear as they leave the contact and I do not think that pay ore has been found in them more than 100 feet below the contact, although they have been prospected deeper.

DAVID SWICKHIMER.

Subscribed and sworn to before me this 28th day of October, A. D. 1892. My commission expires June 8th, 1896.

BEN. H. PATTEN,
Notary Public.

UNITED STATES OF AMERICA, }
District of Colorado, } ss:

In the Circuit Court of the United States in and for said District.

THE RICO-ASPEN CONSOLIDATED MINING COMPANY *et al.*, Plaintiffs, }
vs.
THE ENTERPRISE MINING COMPANY, Defendant. }

STATE OF COLORADO, }
County of Arapahoe, } ss:

Personally appeared Francis T. Freeland, who being first duly sworn according to law deposes and says:

That he is the same Francis T. Freeland who joined in an affidavit of even date herewith with Max Boehman and others for

use in this case and sets forth the results of his and their
121 inspection of the premises in controversy in this cause; that in addition to the facts therein stated by him in conjunction with his associates he makes this separate affidavit for the purpose of identifying certain specimens or pieces of rock taken from the said workings and used to illustrate the formation of that portion of Newman hill developed by said workings, and that all the specimens hereinafter referred to, save one, were taken from the same; that specimens No. 1, marked "Rhodochrosite and ore from vertical near 'A' Vestal Northeast drift" is a piece of the vein filling from what has been called in said other affidavit "the vertical vein underneath the said contact;" that all of said specimens have been labeled by affiant personally, that the labels attached thereto correctly describe the character of the rock and the locality from whence the same was taken.

No. 2 is a typical piece of the contact limestone lying underneath the contact vein in said hill, the piece labeled having been taken from the Vestal drift near point "A" under the contact.

No. 3 is a piece of gypsum taken at the point of contact from raise No. 1 Aspen drift.

No. 10 is a specimen of the porphyritic diorite from the vicinity of said claim in Newman hill, and is the one specimen which was not taken from the workings or some of them.

No. 11 is crushed shale and contact matter taken from raise No. 1 Aspen drift.

No. 12 is a typical piece of the black shale below the contact limestone taken from raise No. 2 Vestal N. W. drift. When damp the shade of the rock is darker than it appears to be in said specimen.

No. 14 is a piece of the silicious shale found some distance below the contact, the sample having been taken from the foot of raise No. 2 Vestal N. W. drift.

No. 15 is another sample of rhodochrosite and ore and comes from the contract inside of the so-called vertical. The sample piece was taken from the neighborhood of raise No. 3 in the Jumbo.

These samples afford a fair idea of the character and diversity of the rock disclosed in the workings on Newman hill so far as the same have been carried, and affiant refers to said samples and makes this affidavit in connection with that to which he has already referred.

FRANCIS T. FREELAND.

Subscribed and sworn to before me this 2d day of November, A. D. 1892.

ALBERT SMITH,
Notary Public.

My commission expires May 7th, 1893.

122 UNITED STATES OF AMERICA, } ss:
District of Colorado, }

In the Circuit Court of the United States within and for the District of Colorado.

THE RICO-ASPEN CONSOLIDATED MINING COMPANY *et al.*, Complainant-,
vs.
THE ENTERPRISE MINING COMPANY, Defendant.

STATE OF COLORADO, } ss:
County of Arapahoe, }

On this day personally appeared Max Boehmer, L. S. Noble, F. T. Freeland, William Byron Page, Arthur B. Litchfield, E. E. Chase, W. H. Wiley and J. B. Murphy and Ernest Le Neve Foster, who being each duly sworn according to law, and each for himself and not one for the other, deposes and says: That each is, with the exception of affiant Murphy, a mining engineer resident of the State of Colorado and for a number of years past engaged in pursuit of his profession and occupation in the said State and elsewhere, and that affiant Murphy is a practical miner of many years' experience in the business of practical mining in the West; that pursuant to an order made by the Honorable Moses Hallett, one of the judges of said court on to wit the — day of October, 1892, affiant proceeded to Rico in the county of Dolores and State of Colorado for the purpose of making a careful examination, inspection and survey of those parts and portions of the mines of the Enterprise Mining Company mentioned and described in said order, together with certain other workings connected therewith and adjoining thereto and made within certain properties in the possession of the complainant company; that the said examination was begun on or about the 25th day of October, 1892, and continued from day to day until on or about the 30th day of October following, during which time affiants made a close and careful examination of such workings of the workings of the defendant company lying within the Hiawatha and Jumbo Lode mining claims together with the Group tunnel of the defendant, as were included in said order, and also certain workings then upon and underneath the Vestal, Aspen, Old Discovery and Selenide Lode mining claims of the complainant, including the drift now being driven across the Vestal and into the Compromise Lode mining claim by the defendant under an order of this court first had and obtained. Affiant also extended their said examination to the surface of the mountain on which the claims of the complainant and defendant companies are situated. The working and under-
123 ground development which were visited and examined consist of levels, drifts and stopes upon what may be designated a contact vein and a drift and workings below said vein extending into country rock, and also upon certain mineral formation hereafter more particularly designated, the mining locations which to-

gether with their workings we have examined, are located upon what is known locally as Newman hill, the formation of which, so far as developed by said workings is composed of shale, limestone and sandstone, having a slight dip or incline in a southwesterly direction. Between a layer of shale above and limestone beneath is a contact vein or deposit which seems to be of indefinite extent, so far as developed, and dipping with the formation. This vein or deposit was found disclosed by the workings and developments above the Group tunnel in the Hiawatha Lode mining claim, and also in workings along the same zone of contact in the Vestal, Aspen, Jumbo, Old Discovery and Selenide locations. The developments in the claims aforesaid, with the exception of the Selenide, along the zone of contact have been quite extensive, and old stopes made upon the ore bodies found therein are largely inaccessible owing to the present condition of the ground. From the examination made by the de-lopments apon said zone of contact the said contact vein or deposit seems to be and is continuous throughout, although ore which — commercially valuable, is not everywhere encountered upon said zone of contact. Affiants are satisfied of this from their said examination which discloses to the eye the existence of said deposits but they also took a line of samples from the said contact at different places throughout the workings in the complainant company's said mines which was selected at arbitrary distances of 25 feet, at which point of measurement whatever was contained within the said zone of contact was taken for said purposes. The general appearance of the said vein of deposit on said zone of contact in the workings both of the complainants and the defendant is the same. The said samples after their selection were sealed and delivered by the affiant W. H. Wiley to J. W. Edwards an assayer of Rico, Colorado, for assay in order to ascertain the silver and gold contents thereof, if any, and affiants refer to the affidavit of the said Edwards verifying the result of said assays which they are informed and believe will be filed and used in connection with this affidavit. The Group tunnel has been driven from its mouth in a southeasterly direction through the country rock for a distance of something more than 1,920 feet. It is driven in the direction of the strike of the formation, and below the level of the contact vein heretofore
124 described. The workings upon the contact vein above are connected with said tunnel by upraises at different points and the workings of the defendant company in the Jumbo claim are connected by said tunnel by what is called the Eureka drift, the said tunnel being used by the defendant company as an exit for ore and waste material.

The said tunnel intersects at different places along its course certain so-called vertical veins, called by the defendant, as affiants are informed and believe, the Swansea vein No. 1, Enterprise, Song Bird, Hiawatha, Eureka, and what the defendant also claims to be the Jumbo No. 2 so called by them, as affiants are informed and believe, since to wit, some time about the month of June, 1892, the so-called veins last mentioned are some of them disclosed in other workings, hereafter to be referred to, and have a general north-

easterly and southwesterly strike. Their dip is nearly vertical. The said tunnel also intersects and discloses a number of so-called cross-veins, which cross-veins have a northerly and northwesterly and southerly and southeasterly strike and are sometimes vertical and dipping sometimes in a northeasterly direction. These so-called cross-veins are also encountered in the other workings hereafter to be referred to below the said contact and showing the same characteristics as are disclosed by the said Group tunnel. The Jumbo shaft of the defendant is approximately one hundred and seventy-five to one hundred and eighty feet south of the northerly end line of the Jumbo claim, and at a depth of about four hundred and fifty feet from the surface a cross-cut has been extended in a southeasterly direction below the said contact and on a level with the Group tunnel before mentioned. This cross-cut is extended through the said claim about four hundred feet, through which interval are intersected the Eureka and certain other and cross-veins so called, all below the zone of contact as aforesaid, the said Eureka vein is encountered by the said cross-cut at a distance of about sixty feet from the said shaft and a drift has been extended northeasterly and southwesterly upon said Eureka vein, making a connection with the Group tunnel northeasterly and passing outside of and beyond the westerly side line of said claim in the other direction.

The said contact vein is reached from said Jumbo cross-cut by a number of upraises made at intervals either on the line of the cross-cut or from laterals connected therewith. At a point where the so-called Jumbo No. 2 vein is encountered by said cross-cut a drift has been run northeasterly into and across the westerly end of the line of the Vestal Lode mining claim, and is now being extended by the defendant across said claim under an order of this court, as affiants are informed and believe. The defendant has also extended
125 said drift in a southerly and southwesterly direction until one branch of it connects with the Old Discovery workings and the southerly branch thereof passed across the northerly end of the Selenide Lode mining claim. That branch of the drift last described which is carried into the Old Discovery ground is extended upon one of the said so-called vertical veins, while that branch thereof which extends into the Selenide ground seems to be driven along one of said so-called cross-veins, which before the breast of said drift is reached has united with the said contact vein. A cross-cut has been driven from the Montezuma or Old Discovery shaft a distance of about three hundred and sixty feet below the collar thereof and about twenty feet below the level of the Group tunnel, and the Jumbo cross-cut. It has a general southeasterly direction and has been extended practically upon a level for a distance of about seven hundred feet to the point of intersection with the said Jumbo drift last above referred to. The said cross-cut intersects in its course a series of so-called vertical and cross veins hereinabove described, and at a distance of about one hundred and twenty feet from its said intersection with the Jumbo drift it encounters one which is particularly large and well defined, called for purposes of distinction "vein A," upon which a short lateral has

been driven for a very few feet in an easterly direction, and to the west for some fifty feet.

A cross-cut has been driven from the Vestal shaft at a depth of about five hundred and eighteen feet from the surface in a general northwesterly direction and underneath said contact, which is reached by upraises made therefrom at intervals. The said cross-cut in its course also intersects a number of said so-called vertical and cross veins and at a distance of about three hundred and forty feet reaches that so-called vertical vein which is designated by the defendant as Jumbo No. 2, the defendant's drift thereon, being about twenty-five feet lower than the level of the said cross-cut. A drift connecting the said Vestal shaft on the same level with the said Vestal cross-cut and running in a general westerly direction encounters the said contact vein at a distance of about seventy-five feet from the said shaft. The said drift connects with a drift running from the Aspen shaft, first in a northwesterly and afterwards in a northerly direction for a distance of about 340 feet, after which it cross-cuts northeasterly about sixty feet where it encounters the so-called Jumbo vein. The said Eureka drift, Jumbo cross-cut, Vestal cross-cut and Montezuma cross-cut are and each of them is below the said contact vein, the distance to the said contact vein above being variable.

The said series of so-called vertical veins having the said northeasterly and southwesterly strike so far as the same have
126 been developed in the workings, unite with the said contact vein from below, and generally along the point of intersection, both in the contact and the vertical are found very good pockets of ore, that in the contact being richer, as affiants are informed and believe, in quality than that which is found in the vertical. The said cross-veins have not been developed a sufficient distance below the said contact vein to enable affiant- to determine the extent to which they are commercially or otherwise valuable. But so far as developments have gone upon the said so-called vertical veins they decrease in value as they leave the said contact vein, the said cross-vein- are so called because their strike lies in a different direction from the strike of the so-called vertical in consequence of which they cross said vertical veins, and the term cross-vein is used to distinguish them from the said vertical veins. Generally speaking, they are not commercially valuable, but they, like the vertical veins, unite with the said contact vein from the lode, and at or near the point where the said union of said so-called cross-veins and the said contact vein occur ore is generally found in paying quantities in said contact vein. Each of said series of vertical veins, to wit, the so-called vertical and the so-called cross-veins, seem- to be broke up into stringers or small crevices just below the points where they extend downward from said contact vein, and instead or leaving it as one crevice leave it in said stringers or small crevices aforesaid. Neither the said so-called vertical, nor the said so-called cross veins intersect the said contact vein or are found anywhere above the shale, hanging wall or roof of said contact vein. Affiants make this last statement entirely upon the developments as far as they have

been and as far as they have been able to examine the same. In no instance where said so-called vertical veins or cross-veins are united with said contact veins has any stopes or workings been extended upwards above the said point of union which would probably be the cause if they had extended any further in an upper direction. The ore in the contact vein near or at the point of union with said vertical or cross veins is not confined to the line of such union, but extends on either side for considerable distances. The term "ore" as here used, is intended to indicate that which is commercially valuable as distinguished from vein matter and the ore chutes within the contact vein are generally found not only along the course or near the vertical vein of both systems, but also at points distant and disconnected from said vertical systems, the said contact being itself mineralized as aforesaid, throughout.

The work which the defendant is doing under an order of court had not been extended a sufficient distance at the time
127 of our examination to justify us in assuming or attempting to determine whether the vein cut by the Group tunnel which the defendant called the Jumbo No. 2 and vein in the Vestal drift are one and the same, upon information and belief, affiants say, that the vein found in the drift from the Jumbo cross-cut which the defendant followed across the Vestal end line was disclosed and developed by the workings in the Jumbo mine, before the Group tunnel intersected the vein which defendant claims to be identical with it, a drift has been extended upon the contact from the Jumbo into the Vestal immediately above the said so-called vertical vein, which affiants are informed and believe was first driven in said territory. Affiants append hereto a tracing which discloses the underground workings of the Vestal, Old Discovery, Jumbo, and Selenide claims, which were examined by affiant- together with a portion of the Group tunnel, the Eureka drift and some of the workings in the Hiawatha Lode mining claim. All the workings upon said map which are colored yellow are upon the contact. The workings which are colored green represent the defendant's workings below the said line of contact, and driven either through the country rock or upon some one or more of the said vertical or cross veins. The workings colored red represent those of the complainant company which lie below the line of contact and in country rock or upon said vertical or cross veins. The distances which have been *driven* in this affidavit are approximations. The contact workings upon the plat referred to are placed thereon from surveys and measurements made during said examination by affiants, on the occasion of their said examination. The time devoted to such examination was too limited to enable affiants to make anything more than a preliminary or hasty survey of said workings, but the same are substantially correct, although when checked up with proper instruments there may be found some slight variations as to direction and distance. The plat does not assume to show all of the workings or excavations upon the contact, many of which were practically to- — at the time of said examination; but is intended to represent those which formed a part of affiants' examination of said

mine. The drift extended from the Vestal to the Aspen shaft, and from the Aspen shaft over to what the defendant calls Jumbo No. 2, being partially within and partially without the said line of contact and generally very near thereto, has been colored yellow upon said plat from the Vestal south side line to the Aspen raise, because although not entirely within the contact, is too near the same to be classed with other said workings. In no portion of the work-
128 ings upon the said contact examined by affiants did any apex, beginning or determination of the same appear.

(Signed) MAX BOEHMER.
LOUIS S. NOBLE.
FRANCIS T. FREELAND.
WILLIAM BYRD PAGE.
ARTHUR B. LITCHFIELD.
E. E. CHASE.
W. H. WILEY.
J. D. MURPHY.
ERNEST LE NEVE FOSTER.

Subscribed and sworn to before me by Max Boemer, Louis S. Noble, Francis S. Noble, William Byrd Page, Arthur S. Litchfield, E. E. Chase, W. H. Wiley, J. H. Murphy and Ernest Le Neve Foster this 2d day of November, A. D. 1892.

ALBERT SMITH,
Notary Public.

My commission will expire the 7th day of May, A. D. 1893.

(Here follows map marked page 129.)

130 & 131 UNITED STATES OF AMERICA, } ss:
ti *District of Colorado,* }

[illegible] Circuit Court of the United States within and for the District of Colorado.

HE RICO-ASPEN CONSOLIDATED MINING COMPANY *et al.*, Plaintiffs, }
vs. }
THE ENTERPRISE MINING COMPANY, Defendant. }

STATE OF COLORADO, } ss:
County of Arapahoe, }

E. E. Chase and L. S. Noble, being first duly sworn, each for himself and not one for the other, deposes and says:

That they are the same persons who have made an affidavit herein in connection with Francis T. Freeland and others, and to which is attached a map. They further state, that they were present at and took notes of the places at which the samples or assays referred to in said affidavit were taken. The said assays were forty-eight in number, and numbered from 1 to 48, inclusive, and that

they have marked upon the said map the point from which they were taken, marking said points as # 1, 2, 3, and so on up to 48, inclusive.

(Signed) E. E. CHASE.
LOUIS S. NOBLE.

Subscribed and sworn to before me this 2d day of November, A. D. 1892.

ALBERT SMITH,
Notary Public.

My commission as a notary public will expire May 7th, 1893.

UNITED STATES OF AMERICA, } ss:
District of Colorado, }

In the Circuit Court of the United States within and for the District of Colorado.

THE RICO-ASPEN CONSOLIDATED MINING COMPANY *et al.*, Plaintiffs, }
vs.
THE ENTERPRISE MINING COMPANY, Defendant. }

STATE OF COLORADO, } ss:
County of Dolores, }

John D. Murphy of lawful age, being first duly sworn according to law, deposes and says, that he is the foreman upon the
132 Vestal mine, which is being operated by the plaintiff company in the above-entitled action; that he is a practical miner, and has been engaged in mining operations for many years last past; that he is one of the persons permitted by the order of the Honorable Moses Hallett, judge, made in the above-entitled acti on the 22d day of October, A. D. 1892, to examine the work done the Enterprise Mining Company in running the level or dri what is called the Jumbo No. 2 vertical vein, through the Ves Lode mining claim aforesaid; and affiant further says, that H. L. Way and Lee S. Wood are the only other persons named in sai order as those who are permitted to examine said work on behalf of the plaintiffs in the above-entitled action, and that the said W. H. L. Way is at present sick and confined to his room at Rico, Colorado, and has been unable to be at said mine or to examine said work for several says last past.

Affiant further says, that in running said drift in the Vestal Lode mining claim on said vein, the defendant company is running the same in a northeasterly direction, and that the said vein has been plainly discernable throughout the distance of said Vestal claim which the defendant company had run it until the same had reached a point about 100 feet from winze A, at which point work was begun under the order of said court; and that at said point above one hundred feet from said winze, said vein had become

broken and split up into several small veins or veinlets, and finally disappeared entirely, as said drift or level was continued in the general direction in which said vein was supposed to run, and in the general direction of said vein as developed and disclosed in said drift, and that at the present time there is no mineral whatever in sight in the breast or near the breast of said drift, and that there is no vein or crevice bearing ore or mineral of any kind in sight in said breast; and that affiant made a careful investigation of the same on this 17th day of November, A. D. 1892, and was unable to discover any vein or ore in sight in said breast and that the defendant company had changed the direction of said drift and was running the same, when affiant was in said drift on this day, in a southwesterly direction, and almost at a right angle to the general course and direction of said drift and vein where said vein has been disclosed, and that the defendant company is violating the order aforesaid in running said drift wider than provided for in said order, and that said drift at the breast and near the breast is more than six feet wide.

And affiant further says, that as such foreman and representative of the plaintiffs in the above-entitled action, he gave notice on
133 this 17th day of November, A. D. 1892, to Daniel Kirby, superintendent of the defendant company, to cease running said drift in the direction in which it was being run, and to stop running said drift entirely for the reason that said defendant company had entirely lost said vein in such workings and that it was not present anywhere in the breast of said drift. Affiant also notified the said Kirby as such superintendent that he was running said drift too wide and was not complying with the order aforesaid in respect to the manner of running the same; and affiant says, that the said Kirby replied to him, affiant, that he would continue running said drift, and that the court, meaning and intending the above-named court, would uphold him in so doing, and in running the said drift or level as it was being run at said time, and said Kirby further informed affiant that he would keep on running said drift as he was then running it until he again found the vein.

And further saith not.

(Signed) JOHN D. MURPHY.

Subscribed and sworn to before me this 17th day of November, A. D. 1892.

BEN. H. PELTON,
Notary Public.

My commission expires June 8th, 1896.

Indorsed: 2827. United States circuit court. The Rico-Aspen Consolidated Mining Co. *et al. vs.* The Enterprise Mining Co. Copies of aff'ts used on hearing filed by leave of court. Filed May 4, 1893. Robert Bailey, clerk. C. S. Thomas, compl't's solicitor.

UNITED STATES OF AMERICA, } ss:
District of Colorado, }

In the United States Circuit Court.

THE RICO-ASPEN CONSOLIDATED MINING CO. *et al.* }
vs. }
THE ENTERPRISE MINING CO. }

STATE OF COLORADO, } ss:
County of Arapahoe, }

Max Boehmer, being of lawful age and being duly sworn, deposes and says:

That he lives in Leadville, Colorado. That he is a civil and mining engineer by profession, and that he has continuously practiced his profession for the last twenty-two years. That he
134 is acquainted with the Jumbo Lode mining claim belonging to the Enterprise Mining Company and the Vestal Lode mining claim belonging to the Rico-Aspen Consolidated Mining Company, both situate in — mountain, Pioneer mining district, Colorado. That during the latter part of August he made a survey of the surface and underground workings on both these mining claims and that the results of such survey are embodied in the map accompanying this affidavit.

That in said map the boundaries and workings of the Vestal Lode claim are shown in green colors and the boundaries and workings of the Jumbo Lode claim in red color.

That the main level from the Vestal shaft runs in a northwesterly direction about 400 feet from said shaft, terminating in a winze marked "B" about 20 feet deep, said winze being situate 85 feet east of the west end line of the Vestal Lode claim U. S. survey No. 6252.

That such portion of the Vestal main level, near the end, running northeasterly and sout-westerly follows a vein containing [illegible] and silver ores in paying quantities and quality and that [illegible] winze "B" is sunk in ore to a depth of about 20 feet below the main level.

That the main level of the Jumbo Lode claim, colored in full red is identical with the Group tunnel level and that one branch of said level running in a northeasterly direction crosses the west end line of the Vestal Lode claim at a point situate about 140 feet north of the S. W. corner of the Vestal Lode claim.

That on August 29th, '92, said Jumbo level had advanced 70 feet across the Vestal end line to a point marked "Breast C" on the map and the subsequently, about September 1st, '92, the men working in the said level broke into the bottom of winze "B," the Jumbo level being about 20 feet below the Vestal level.

That from a certain upraise marked "A" on the map, at a height of about 48 feet above the main level there is a drift following a certain geological horizon locally called "the contact."

The said drift crosses the west end line of the Vestal Lode claim and penetrates the latter to a distance of 35 feet to a point marked "Breast D and C" on the map.

That both of breast D and C, at the time of the survey, men employed by the Enterprise Mining Company were engaged in stoping and mining valuable ore, very rich in gold and
135 & 136 silver, from the territory situate within the boundaries of the Vestal Lode mining claim, U. S. survey No. 6252, and outside of the boundaries of the Jumbo Lode mining claim.

MAX BOEHMER.

[SEAL.] Subscribed and sworn to before me this 3rd day of September, A. D. 1892.

ALBERT SMITH,
Notary Public.

My commission as a notary public will expire May 7th, 1893.

(Here follows map marked page 137.)

138 & 139 Indorsed: 2827. In the circuit court of the United States. The Rico-Aspen Consolidated Mining — *vs.* The Enterprise Mining Company. Affidavit of Max Boehmer. Filed Sep. 8, 1892. Robert Bailey, clerk U. S. circuit court. Charles J. Hughes, Jr., att'y for the Rico-Aspen Consolidated M'ng Co.

UNITED STATES OF AMERICA, } ss:
District of Colorado, }

In the District Court of the United States for said District.

THE RICO-ASPEN CONSOLIDATED MINING COMPANY, Plaintiff, }
vs.
THE ENTERPRISE MINING COMPANY, Defendant. }

Lee S. Wood, being first duly sworn on oath according to law, deposes and says that he is the superintendent of the mines now being worked and controlled by said plaintiff, that he is well acquainted with the ground in controversy between said plaintiff and said defendant and is also well acquainted with the vein on which defendant was ordered by said court to prosecute work through the Vestal and Contention Lode mining claims; that defendant is now prosecuting such work and is extracting large quantities of rich ore therefrom, that the ore so extracted from the said vein is transported by defendant underground for a distance of more than two thousand feet from the place of its extraction to the place of storage and is carried through the Group tunnel which lies exclusively upon defendant's own ground and through which defendant transports large quantities of rich ores and of different grades of richness from the different claims owned by defendant and worked through said tunnel.

That deponent has been appointed by said court an inspector to look after and watch the development of said vein in said Vestal and Contention Lode mining claims and to watch the extraction and transportation of ores therefrom and to generally look after the interests of plaintiff. That thus far one H. W. L. Way who was also appointed by said court as an inspector with like duties has been watching the work done on said vein by defendant and has been endeavoring to keep track of the ore. That deponent is informed and believes that defendant had continuously refused to the said Way the privilege of passing through said Group tunnel.

Deponent further says that it is impossible for any one to identify the ore extracted from said vein without his having the privilege of following such ore from the point of its extraction to the place of its storage, for the reason that defendant is transporting through said Group tunnel large quantities of ore which might be changed for the ore taken from said vein unless such ore should be sacked in the mine where extracted by said plaintiff or some one for it should be allowed to seal said sacks in the mine; that the only protection for said plaintiff in this regard would be in requiring the defendant to sack said ore as aforesaid and to permit some disinterested party to seal all such sacks and that plaintiff be allowed to keep a record of such seals and sacks.

140

LEE S. WOOD.

[SEAL.] Sworn to before me and subscribed in my presence this twelfth day of October, A. D. 1892.

BEN. H. PELTON,
Notary Public.

My commission expires June 8th, 1896.

UNITED STATES OF AMERICA, }
District of Colorado, } *ss:*

In the District Court of the United States for said District.

THE RICO-ASPEN CONSOLIDATED MINING COMPANY, Plaintiff, }
vs. }
THE ENTERPRISE MINING COMPANY, Defendant. }

H. W. L. Way, being first duly sworn upon his oath, deposes and says that he is the surveyor for the Rico-Aspen Consolidated Mining Company doing a mining business at Rico, Dolores county, Colorado. That deponent for and on behalf of said plaintiff and at its instance and request made application to said defendant to be allowed to seal the sacks of ore which the defendant is allowed to take out of the Vestal Lode and Contention Lode claims in controversy in said suit under the order of said court allowing said defendant to run a drift upon said Vestal and Contention ground and was refused permission to seal said sacks. That said ore is transported a long distance underground and is taken through the Group tunnel which lies exclusively upon defendant's own ground. That said defendant refuses

to allow said plaintiff or this deponent to pass through said Group tunnel for the purpose of seeing the ore taken out of said drift and conveyed to the entrance of said tunnel. That there exists no way by which plaintiff can determine whether all the ore taken out of said drift is accounted for and no way to determine whether the said ore is changed with other ores of a less value. That defendant takes large quantities of ore from its own ground through
141 said Group tunnel and can easily make such change of ores as it may see fit to do so. That in the event of any such change or the failure of the defendant to account for any ore taken out of said drift it would be entirely impossible for said plaintiff to ascertain that fact without said plaintiff is allowed by its representative or other disinterested person to seal the sacks of ore as fast as the ore is taken out of the mine and sacked. That the only safety or protection for the plaintiff in this regard would be in requiring the defendant to sack and seal all ore in the mine in the presence of some one representing the plaintiff and that said plaintiff be allowed also to count the sacks and to keep a record thereof. That deponent is one of the parties appointed by said court to inspect the prosecution of work upon said drift.

HERBERT W. L. WAY.

[SEAL.] Subscribed and sworn to before me this tenth day of October, A. D. 1892.

JOSIAH P. NORTON,
Notary Public.

My commission expires Oct. 25, 1892.

UNITED STATES OF AMERICA, *ss:*

In the Circuit Court of the United States, District of Colorado.

THE RICO-ASPEN CONSOLIDATED MINING COMPANY, Complainant,
v.
THE ENTERPRISE COMPANY, Defendant.

STATE OF COLORADO, *County of Arapahoe,* } *ss:*

Before me, the subscriber, a notary public, in and for said county, personally appeared Douglas L. V. Browne of lawful age, who being first duly sworn, saith: That there is a large body of high-grade ore in the drift running across the Vestal Lode claim now being run by defendant under permission of the court; that affiant, as manager of the complaining company, requested the defendant to allow him to seal the sacks of ore taken from such drifts in order to identify the same, with which request the defendant refused to comply; that the ore so taken, both from said drift and the drift run from the Group tunnel, is sorted and shipped along with ore of various grades from many other points of the mines and complainants have no means of ascertaining how much is taken out, nor the grade of that

which is taken out, unless it is permitted to have an examiner in the drifts at all hours, and also either to seal or follow up the ore until shipped.

142 That this defendant company has actual possession and opportunity to send in examiners and experts from time to time without limit, while the complaining company is wholly denied access to said drifts for such purpose, and that the complaining company desires to send in certain persons to examine said drifts, with the permission of this court, who are expected to be temporarily present in Rico during the present month of October and may not be able to make such examination at a subsequent period.

This affidavit is made in support of the motion of complainants for leave to have the hours of access for their examiners increased, to make the number of examiners three and to allow of an inspection by three witnesses.

DOUGLAS L. V. BROWNE.

[SEAL.] Sworn and subscribed before me this 12th day of October, A. D. 1892.

HARRY G. McCULLOCH,
Notary Public.

My commission expires Nov. 12, 1895.

Indorsed: No. 2827. U. S. circuit court. Rico-Aspen Co. *v.* Enterprise Co. Af't of D. L. V. Browne for compl't & of Way and Wood. Filed Oct. 13th, 1892. Robert Bailey, clerk U. S. circuit court.

UNITED STATES OF AMERICA, *District of Colorado*, } ss:

In the Circuit Court of the United States in and for said District.

THE RICO-ASPEN CONSOLIDATED MINING COMPANY *et al.*, Complainants,
vs.
THE ENTERPRISE MINING COMPANY, Defendant.

STATE OF COLORADO, *County of Arapahoe*, } ss:

A. B. Roeder, of lawful age, being first duly sworn, deposes and says: That he is a resident of the city of Denver and county of Arapahoe, but is familiar to some extent with the ground of the Enterprise Mining Company and the controversy now raging between the above-named parties. He appends herewith a prospectus and map of the defendant company and says upon information and belief that the same was issued and has been largely circulated by the said defendant company since its organization; that it has been used for the purpose of promoting the business affairs of said

143 company and inducing subscriptions to the stock thereof, and that the said prospectus was written for and the map accom-

panying the same was prepared by careful estimates made by its engineer and for the uses and purposes aforesaid.

A. B. ROEDER.

[SEAL.] Subscribed and sworn to before me this 10th day of November, A. D. 1892.

ANDREW B. DAVIDSON,
Notary Public.

My commission expires December 13th, 1894.

The subscription list will open July 27th, 1891, and will be closed on or before Aug. 3rd. The subscriptions will be received by George Crawford, 33 Wall street, New York, and room 506, Lewis block, Pittsburg.

Edward L. Brewster & Co., bankers and brokers, Dearborn and Monroe streets, Chicago.

Third National bank, Wood street, Pittsburg, Pa.

Market National bank, 89 State street, Boston, Mass.

Registrar of stock.

The Farmers' Loan and Trust Co., New York.

The
Enterprise Mining Company,
incorporated 1891 under the laws of the State of New Jersey, fully paid and unassessable, no individual liability whatever.

Capital, $2,500,000,
in 500,000 shares at $5.00 each,
of which 400,000 are now offered for subscription, payable as follows:

$1.00 per share on application.
2.00 " " allotment.
2.00 " " August 25th.

Lloyd I. Seaman, president.
George Crawford, secretary and treasurer.

Directors.

Lloyd I. Seaman, New York. James McKay, Pittsburg.
George Crawford, New York. Wm. M. McKelvy, Pittsburg.
Hugh L. Cole, New York. Oliver P. Posey, White Water, Wis.
John E. Ward, Morristown, N. J. W. B. Williams, Chicago.
William A. Boland, 610 Exchange building, Boston.

Secretary and offices,
33 Wall street, New York.

144 *Prospectus.*

Objects. This company is formed to acquire as a "going concern" the Enterprise group of mines, comprising the Enterprise, Laura, Eureka, Ontario, Hiawatha, Kitchen, Bell, Night Watch, Snow Flake, Song Bird, Thompson, and Anaconda Lode mining claims; the Jumbo group, comprising the Jumbo, and the Headley Lode mining claims; the Group tunnel site; and the Onomoo tunnel site; with all plants, materials, appurtenances, etc., belonging thereto as on the first day of January, 1891.

Situation. These mines are situated on Newman hill near the town of Rico, Dolores county, Colorado. (See accompanying plan of the properties.)

Acreage of claims. The claims comprise an area of about 125 acres of which only a small portion has been mined for mineral.

Buildings. The buildings comprise miners' boarding-houses, ore-sorting rooms and ore-houses, blacksmiths' shops, shafts, and engine-houses for hoisting, electric light, machinery, etc.

Machinery. There is a complete hoisting plant of machinery on the Jumbo, the Enterprise and the Laura claims with air compressor, drill, etc. There is also an electric plant on the Enterprise group giving light for the mine and all the buildings.

Product of the mines. The Enterprise properties commenced to produce in the latter part of the year 1888. They were developed by means of a shaft, and shipments were made in 1889 and 1890. (See accompanying statement taken from the ore shipped from the Enterprise group of mines.) Attention is especially directed to the phenomenally high grade of the ores both gold and silver. These amounts are tabulated from the original smelters' sales notes, and are guaranteed correct. The Jumbo mines, the newest discovery, shipped during 1890 about 312 tons of ore, which produced net smelters' returns $102,501.30.

Present output of the mine. The present output from these properties is greater that it has ever been, and it is safe to estimate that the profits to be paid in dividends during this year, out of the ore mined up to January 1st, 1892, will not be less than five
145 hundred thousand dollars ($500,000), and during the first year to July 1st, 1892, one million dollars ($1,000,000) or 40 per cent. per annum on the capital stock.

Virgin mines.

As these are virgin mines and the territory is so large, it will require many years to exhaust them, and the future promises wonderful results.

Ore shipped to smelters.

As the ores produced are smelting ores, they are shipped direct from the ore-houses to the various smelters. The company therefore requires no smelting plant and the cost of production is confined to mining and marketing the ore. For further improving the working facilities and systematic prospecting of the various claims for new ore bodies, a working capital of $150,000 has been provided. This amount is considered more than ample.

Management of the property.

Mr. Crawford, who has been connected with many of the mining properties of Colorado, namely, the Yankee Girl, New Guston and others, has agreed to become general manager of the property. He takes a large number of shares in this company, and his interests are bound up in the future success of the undertaking. He believes these are the greatest mining properties he has ever been interested in. The immense ore bodies at present intact, and the very large amount of productive ground undeveloped will enable this company to pay very handsome and regular dividends. The phenomenal richness of the ore, and the low cost at which it can be mined (as the ground is easily worked) and the advantages of a railroad almost completed to the mines, make these properties very attractive for investment.

Mr. Oliver P. Posey, who has been for many years associated with Mr. Crawford in his mining operations, fully confirmed Mr. Crawford's opinion of these properties. He has made a thorough personal examination of the mines and says that he considers them the most valuable properties which he has ever examined, and that they can easily pay one million dollars per annum in dividends.

Transportation.

146 Up to the present time the ores from these mines have necessarily been shipped some 35 or 40 miles across the mountains by freight teams, and all machinery, material and supplies have — received by the same means. At present, however, the railroad to Rico is nearly completed and it is expected that it will be in operation about the 1st of August. Thereafter all ores will be shipped direct to the various smelters, and all machinery, etc., received by rail, thus effecting a great saving in freight.

Developments.

A glance at the accompanying plans of the property will show the great extent of the underground workings in the territory; and not only are the mines fully equipped with hoisting machinery, but included in this purchase is the Group tunnel, some 1,300 feet in length, which develops the claims by means of a tunnel, from which in the future the ore will be taken out. It is proposed to complete a railroad siding to the ore-house which will be erected at the mouth of the tunnel, and to load the ores directly therefrom into the cars.

Subscriptions.

The right is reserved to reject any subscription or to accept it in part.

If any subscription is wholly rejected, the amount deposited on application will be returned.

Allotment.

If the whole amount applied for be not allotted, the amount paid on application will be applied on sums to become due on the allotment. Receipts will be given for all payments made, and engraved company's certificates will be delivered as soon as practicable after the making of the final payment. Any installment may be paid in advance under discount at the rate *at* 5 % per annum. Failure to pay any installment when due, will forfeit all previous payments.

Dividends.

Dividends will be paid at the office of George Crawford, 33 Wall street, New York, or will be sent by mail to shareholders upon request.

Quotations.

It is intended to list the shares and apply for stock exchange quotations.

Prospectuses and forms of application can be obtained at the offices of the company, 33 Wall street, New York, and at the offices of the several bankers and brokers where subscriptions are to be received.

147 Special attention is called to the very high grade of ore, both gold and silver.

Statement,

As tabulated from smelter's sale notes of ore shipped from Enterprise and Jumbo groups of mines. Prices based on gold at $20.00 per oz., silver $1.60 per oz., lead 80 cts. per unit.

Date payment for shipment.	Weight, lbs.	Gold, oz. per ton.	Silver, oz. per ton.	Lead, per cent. per ton.	Value, gold.	Value, silver.	Value, lead.	Total value.
1888.								
July 26	24,097	1.60	333.30	.....	$385 55	$4,015 77	.....	$4,401 22
September 6	31,846	2.57	471.80	7.00	818 44	7,512 47	$89 17	8,420 08
October 9	24,328	.70	330.25	9.70	170 49	4,017 16	94 39	4,282 04
9	23,420	1.10	346.90	12.00	257 62	4,062 19	112 41	4,432 22
November 14	18,066	1.25	312.80	26.00	225 82	2,825 52	197 89	3,249 23
14	70,792	.50	375.00	9 [illegible]	353 96	13,273 50	269 00	13,896 46
1889.								
January 8	83,683	.67	373.65	7.00	560 67	15,132 08	292 89	15,985 64
8	12,556	1.95	251.23	12.00	244 84	1,577 22	60 21	1,882 27
May 4	70,430	.80	517.40	12.00	653 44	18,220 24	338 06	19,121 74
June 12	21,384	1.25	356.00	12.50	267 30	3,806 35	106 95	4,180 57
12	23,256	1.10	352.70	11.40	255 81	4,101 19	106 05	4,463 05
August 8	120,861	1.76	252.90	10.90	2,127 15	15,282 87	527 05	17,937 07
8	94,801	1.79	379.90	13.00	1,696 94	17,957 94	492 96	20,137 44
16	90,615	1.94	238.30	6.90	1,757 93	12,835 61	250 10	14,843 64
19	39,165	1.89	249.20	7.80	740 17	4,879 95	122 19	5,742 31
20	19,780	1.85	215.00	9.00	365 93	2,472 50	71 21	2,909 64
20	43,441	1.85	250.30	10.50	803 66	5,566 96	182 80	6,553 42
31	98,667	1.52	160.90	12.20	1,499 74	7,937 76	481 43	9,918 93
1889.								
August 31	22,470	2.00	402.50	14.10	449 40	4,522 09	125 73	5,097 22
September 2	57,640	1.42	171.00	12.00	823 40	4,928 22	276 67	6,028 38
9	57,959	1.67	228.80	7.00	967 81	6,632 16	162 29	7,762 26
11	19,331	1.70	222.50	8.00	319 13	2,150 57	61 41	2,531 11
11	27,789	2.18	395.50	9.00	605 80	5,495 25	101 04	6,202 09
11	37,110	2.60	446.00	16.50	964 86	8,275 53	244 94	9,485 23

Statement, &c.—Continued.

	Date payment for shipment.	Weight, lbs.	Gold, oz. per ton.	Silver, oz. per ton.	Lead, per cent. per ton.	Value, gold.	Value, silver.	Value, lead.	Total value.
	1889.								
148	September 11	40,867	1.35	200.30	9.50	551 70	4,092 83	155 29	4,799 82
	13	25,662	1.84	323.60	7.00	472 16	4,152 11	76 98	4,701 25
	September 21	65,174	1.67	230.40	6.10	1,088 40	7,508 04	159 52	8,755 96
	21	22,342	2.42	321.30	6.20	540 68	3,589 24	55 41	4,185 33
	October 3	19,427	1.55	219.40	9.00	301 12	2,131 14	69 94	2,502 20
	9	55,694	1.50	219.00	8.00	835 41	6,097 49	183 72	8,116 62
	11	18,140	2.25	312.10	7.60	408 15	2,830 75	55 15	3,294 05
	14	19,206	1.80	297.30	21.30	345 71	2,855 07	184 38	3,385 16
	14	37,558	1.00	184.00	8.00	375 88	3,353 09	120 28	3,850 25
	10	51,521	1.13	176.20	12.90	582 19	4,539 00	265 85	5,387 04
	18	40,008	2.20	302.80	6.50	880 18	6,057 21	104 04	7,041 43
	21	34,417	1.30	222.00	6.80	447 42	3,820 29	93 62	4,361 33
	November 4	54,644	1.17	191.40	10.80	639 33	5,229 42	236 06	6,104 81
	12	19,413	1.50	236.50	11.30	291 19	2,295 59	89 75	2,676 53
	16	35,953	2.60	333.40	8.30	934 78	5,993 36	130 36	7,058 50
	22	59,919	1.83	286.30	12.50	1,096 52	8,577 41	301 99	9,975 92
	22	20,362	3.00	469.00	14.30	610 86	4,774 89	116 47	5,502 22
	1890.								
	July 9	48,146	4.75	563.93	12.80	2,286 93	14,282 51	150 21	16,719 65
	10	44,663	2.60	300.00	10.70	1,161 24	6,699 45	187 58	8,048 27
	10	41,708	2.98	291.20	9.90	1,242 89	6,072 60	165 16	7,480 65
	15	43,764	4.50	583.50	13.20	1,969 38	12,768 15	143 55	14,881 08
	18	23,153	4.95	603.60	15.20	1,146 07	6,987 57	104 77	8,238 41
	1890.								
	July 23	23,234	4.25	534.73	13.50	991 69	6,238 69	126 00	7,356 38
	24	46,335	2.25	320.30	4.50	978 27	7,420 55	78 40	8,477 22
	August 2	41,949	2.49	231.66	9.30	1,044 53	4,858 95	156 05	6,059 53
	4	40,201	2.20	269.00	4.70	884 42	5,407 03	75 57	6,367 02
	4	44,034	5.32	592.90	13.60	2,342 60	13,053 88	289 54	15,686 02
	9	40,412	2.28	252.70	10.80	1,012 59	5,611 45	191 85	6,815 89

	9	42,328	2.26	208.40	9.80	956 61	4,410 58	165 92	5,533 11
	11	41,686	2.40	209.30	11.00	1,000 46	4,363 24	177 91	5,541 61
	13	38,894	2.26	279.90	8.70	879 00	5,443 21	135 35	6,457 56
	18	40,693	2.50	297.00	10.40	1,017 37	6,042 91	169 18	7,229 46
	22	45,619	2.55	270.00	9.70	1,163 28	6,158 56	177 00	7,498 84
	27	42,694	2.80	193.70	9.40	1,195 43	4,134 91	160 52	5,490 86
	28	39,628	1.89	215.70	10.70	749 48	4,273 88	169 60	5,192 96
	28	43,817	4.26	599.00	14.40	1,866 60	13,117 69	252 38	15,236 67
	28	41,178	2.89	482.60	13.10	1,190 04	9,936 25	215 77	11,432 06
149	September 2	20,629	2.42	462.10	13.10	499 22	4,766 33	108 09	5,374 64
	4	37,395	2.04	247.20	11.10	762 85	4,621 52	166 03	5,550 40
	September 5	44,372	1.75	247.60	11.80	776 51	5,493 25	209 43	6,479 19
	8	41,162	1.76	244.20	11.10	724 45	5,025 88	182 75	5,933 08
	12	42,067	1.80	238.90	10.30	757 20	5,022 90	173 31	5,953 41
	18	39,026	1.84	191.70	10.17	713 07	3,740 64	158 64	4,612 35
	19	21,442	2.54	486.60	15.60	330 20	5,216 84	133 79	5,680 83
	22	8,224	2.07	265.20	3.90	170 24	1,090 50	12 83	1,273 57
	22	21,487	3.10	562.90	15.10	686 09	6,047 51	129 03	6,862 63
	29	41,773	1.60	197.90	11.70	658 36	4,133 43	195 49	4,997 28
	October 1	35,313	1.75	185.20	10.50	617 97	3,260 98	148 31	4,036 26
	13	35,753	2.30	249.10	6.10	822 32	4,953 03	87 24	5,862 59
	17	33,614	2.31	242.00	6.00	776 48	4,067 29	80 67	4,924 44
	1890.								
	October 25	19,907	3.80	590.70	14.70	750 46	5,879 53	116 95	6,752 94
	29	41,165	1.83	186.50	9.80	753 31	3,838 64	161 36	4,753 31
	November 11	21,105	2.42	366.90	11.90	510 79	3,871 71	100 45	4,482 95
	13	44,458	1.93	172.00	11.50	880 26	3,823 39	204 50	4,908 15
	22	43,645	2.18	193.10	10.80	951 46	4,213 92	188 00	5,353 98
	December 1	42,807	1.56	181.00	11.70	667 79	3,874 03	200 33	4,742 15
	1	19,351	3.70	402.10	14.00	715 98	3,890 51	108 37	4,714 50
	10	20,521	1.92	204.30	9.90	394 00	2,096 22	81 26	2,571 48
	16	47,161	1.71	190.90	10.20	806 45	4,501 51	172 41	5,480 37
	24	41,429	1.65	201.60	11.80	733 08	4,175 99	195 54	5,104 61
	29	19,835	1.51	235.20	13.10	219 63	2,334 62	103 95	2,658 20
	January 16	40,664	1.93	235.97	9.50	784 81	4,797 74	154 52	5,737 07
	February 6	21,110	2.04	240.95	9.20	430 64	2,543 23	78 35	3,052 40
	6	20,394	3.80	505.20	11.35	774 97	5,151 52	92 59	6,019 08

Statement, &c.—Continued.

Date payment for shipment.		Weight, lbs.	Gold, oz. per ton.	Silver, oz. per ton.	Lead, per cent. per ton.	Value, gold.	Value, silver.	Value, lead.	Total value.
1890.									
March	26	43,548	2.37	342.44	7.60	1,032 09	7,456 29	132 38	8,620 72
	26	43,742	2.30	309.10	8.70	1,001 06	6,760 33	152 17	7,913 56
	26	43,884	2.56	357.35	8.22	1,122 40	7,833 82	144 03	9,100 25
April	7	28,230	2.31	314.69	7.55	1,113 11	7,188 75	145 65	8,447 51
		3,593,251							$634,858 93
		908,000							158,900 00
		4,501,251	=2,250 tons.						
			312 tons shipped from Jumbo mines in 1890.				Net value		102,501 30
			2,562 tons.				Net value		$896,260 23

Original smelter's account sales are to be seen at the office of George Crawford, 33 Wall St., New York.

150 *What Honest Mining Yields.*

Mining should be gauged by pure business standards. Men count the cost and profits of other business. They study its conditions and opportunities. They calculate its chances and results. Having satisfied themselves about it by inquiry from the best sources of information, they cast their lot with it. Apply this system to mining and note the results.

The volume on mines and mining just issued by the Census Bureau shows the following totals:

Product of the mines for the year ending June, 1890	$550,988,450
Number of industrial mining establishments	30,000
Number of persons employed	512,114
Annual wages in mining	212,409,809
Capital engaged in mining	1,173,000,000
Profit in sight on capital invested	50%

Authentic reports from some of the best known mines furnish this summary:

Mine.	Capital.	Quarterly dividends.	Total dividends paid.
Ontario	$15,000,000	$225,000	$11,975,000
Granite Mountain	10,000,000	600,000	11,000,000
Yankee Girl	1,300,000	150,000	2,000,000
New Guston	550,000	110,000	832,500

The rate of dividend paid by the Yankee Girl is 40 per cent. per annum and by the New Guston is 80 per cent. per annum on the capital stock.

No other industry shows such results.

In modern mining the chances are reduced to a minimum. It is conducted by men who know what they are about. The above figures show how well they know. Mining products have a permanent value. There is no waste, nothing to perish.

The product of the mines is the basis of all wealth. It is always in demand. Its sale involves no credits. It brings spot cash the world over.

Silver mines are of special value. A large percentage of the gold produced each year is taken from them. If silver mining were shut down, the financial safety of the country would be imperiled in times like the present, when the draft of gold by Europe is unceasing. The large surplus of gold on hand in this country was obtained from the mines. From this product the United States is able to save the credit of Europe.

151 & 152 *The Enterprise Group is a Gold as Well as a Silver Producer.*

"It will surprise the general public to know that no less than 69 mining companies paid dividends during the month of June, one of them paying $15.50 per share. The total for the half year was nearly $8,000,000."—Mail and Express, New York, July 6, 1891.

"Today the production of silver is probably the most profitable industry in the United States."—Senator John Sherman in a letter to W. R. Dalby, July 7, 1891.

The
Enterprise Mining Company.
Capital, $2,500,000.
500,000 shares @ $5.00 per share.

Prospectus.

Directors.
Lloyd I. Seaman,
Jas. McKay,
Wm. M. Kelvy,
George Crawford,
O. P. Posey,
Hugh L. Cole,
John E. Ward,
W. A. Boland,
W. B. Williams.

Secretary.
George Crawford.

Offices.
33 Wall street, N. Y.

(Here follows map marked page 153.)

154 & 155 Indorsed: U. S. 2827. Circuit court. Rico-Aspen Con. Min. Co. *vs.* Enterprise Min. Co. Affidavit of A. B. Roeder. Filed Dec. 1, 1892. Robert Bailey, clerk. Thomas, Bryant & Lee, att'ys for compl't.

Mineral Certificate No. 845.

General Land Office, No. 19531.

The United States of America to all to whom these presents shall come, Greeting:

Whereas, in pursuance of the provisions of the Revised Statutes of the United States, chapter six, title thirty-two, and legislation supplemental thereto, there have been deposited in the General Land Office of the United States the plat and field-notes of surveys

and the certificate No. 845, of the register of the land office at Durango, in the State of Colorado, accompanied by other evidence whereby it appears that Alonzo P. Adams and Wiley E. So Relle did, on the thirtieth day of June, A. D. 1890, duly enter and pay for that certain mining claim or premises, known as the Vestal Lode mining claim designated by the surveyor general as lot No. 6252 embracing a portion of section thirty-six, in township forty north, and of section one, in township thirty-nine north, of range eleven west, New Mexico meridian, in the Pioneer mining district, in the county of Dolores and State of Colorado, in the district of lands subject to sale at Durango and bounded, described and platted as follows, with magnetic variation thirteen degrees and thirty minutes east:

Beginning at corner No. 1 an aspen post five inches in diameter marked 1 x 6252 with mound of stone, from which an aspen stump twelve inches in diameter marked 1 x 6252 B. S. bears north forty-four degrees and thirty minutes west eleven feet distant, corner No. 16 of survey No. 5805 the Hiawatha Lode claim bears north sixty-six degrees and forty-three minutes west two hundred and six feet distant, and the corner common to sections twenty-five, twenty-six, thirty-five and thirty-six, in township forty north of range eleven west, New Mexico meridian, bears north thirty-one degrees and forty-four minutes west five thousand six hundred and eighty-five and nine-tenths feet distant.

Thence, first course, south sixty-one degrees and fifty-six minutes east one thousand five hundred feet to corner No. 2.

Thence, second course, south one degree and eighteen minutes west one hundred and sixty-eight feet to a point from which the entrance to discovery cut bears north sixty-one degrees and fifty-six minutes west ten feet distant, three hundred thirty-six feet to corner No. 3.

156 Thence, third course, north, sixty-one degrees and fifty-six minutes west one thousand five hundred feet to corner No. 4.

Thence, fourth course, north one degree and eighteen minutes east three hundred and thirty-six feet to corner No. 1, the place of beginning, said lot No. 6252 extending one thousand five hundred feet in length along said Vestal vein or lode, and containing ten acres and thirty-three hundredths of an acre of land more or less.

Now know ye, that there is therefore hereby granted by the United States unto the said Alonzo P. Adams and Wiley E. So Relle and to their heirs and assigns, the said mining premises hereinbefore described, and not expressly excepted from these presents, and all that portion of the said Vestal vein, lode or ledge, and of all other veins, lodes or ledges, throughout their entire depth, the tops of apexes of which lie inside of the surface boundary lines of said granted premises in said lot No. 6252 extended downward vertically although such veins, lodes, or ledges in their downward course may so far depart from a perpendicular as to extend, outside the vertical side lines of said premises: Provided, that the right of possession to such outside parts of said veins, lodes, or ledges shall be

confined to such portions thereof as lie between vertical planes drawn downward through the end lines of said lot No. 6252, so continued in their own direction that such planes will intersect such exterior parts of said veins, lodes, or ledges; and provided further, that nothing herein contained shall authorize the grantees herein to enter upon the surface of a claim owned or possessed by another.

To have and to hold said mining premises, together with all the rights, privileges, immunities, and appurtenances of whatsoever nature thereunto belonging unto the said grantees above named and to their heirs and assigns forever; subject nevertheless to the above-mentioned and to the following conditions and stipulations:

First. That the premises hereby granted, with the exception of the surface, may be entered by the proprietor of any other vein, lode, or ledge the top or apex of which lies outside of the boundary of said granted premises, should the same in its dip be found to penetrate, intersect, or extend into said premises, for the purpose of extracting and removing the ore from such other vein, lode or ledge.

Second. That the premises hereby granted shall be held subject to any vested and accrued water rights for mining, agriculture, manufacturing, or other purposes, and rights to ditches and reservoirs used in connection with such water rights as
157 may be recognized and acknowledged by the local laws, customs, and decisions of courts. And there is reserved from the lands hereby granted, a right of way thereon for ditches or canals constructed by the authority of the United States.

Third. That in the absence of necessary legislation by Congress, the legislature of Colorado may provide rules for working the mining claims or premises hereby granted, involving easements, drainage, and other necessary means to its complete development.

In testimony whereof, I, Benjamin Harrison, President of the United States of America, have caused these letters to be
[SEAL.] made patent, and the seal of the General Land Office to be hereunto affixed.

Given under my hand at the city of Washington the sixth day of February, in the year of our Lord one thousand eight hundred and ninety-two, and of the Independence of the United States the one hundred and sixteenth.

By the President:

BENJAMIN HARRISON,
By M. McKEAN, *Secretary.*

D. P. ROBERTS,
Recorder of the General Land Office.

Recorded vol. 208, pages 439 to 441, inclusive.

STATE OF COLORADO, } ss:
County of Dolores, }

Know all men by these presents, that J. P. Norton and J. W. Park the undersigned, have, this 20th day of March, 1886, relocated and claimed, and by these presents do relocate and claim, by right

of discovery and relocation, in compliance with the mining acts of Congress, approved May 10, 1872, and all subsequent acts, and with local customs, laws and regulations, 1,500 linear feet and horizontal measurement on the Jumbo lode, vein, ledge, or deposit, along the vein thereof, with all its dips, angles and variations, as allowed by law, together with 150 feet on each side of the middle of said vein at the surface, so far as can be determined from present developments; and all veins, lodes, ledges or deposits and surface ground within the lines of said claim, 1,480 feet running north from center of discovery shaft, and 20 feet running south from center of discovery shaft; said discovery shaft being situate upon said lode, vein, ledge or deposit, and within the lines of said claim in
158 Pioneer mining district, county of Dolores and State of Colorado, described by metes and bounds as follows, to wit:

Beginning at corner No. 1 being the S. W. cor.; thence 300 ft. E. to S. E. cor. No. 2; thence 750 ft. N. to E. side-line stake; thence 750 ft. N. to N. E. cor. No. 3; thence 300 ft. W. to N. W. cor. No. 4; thence 750 ft. S. to W. side-line stake; thence 750 ft. S. to place of beginning. The above-described mining claim is a relocation of the Silver Lining mining claim located on Newman hill and adjoining the Newman mining claim which is a patented claim.

J. W. PARK. [SEAL.]
J. P. NORTON. [SEAL.]

Date of location, 20th March, A. D. 1886.
Date of certificate, May 25th, A. D. 1886.

Indorsed: 2827. Copy. Location certificate. On the Jumbo mining claim of J. W. Park *et al.* in Pioneer mining district, Dolores county, State of Colorado. State of Colorado, county of Dolores, *ss:* I hereby certify that this location certificate was filed for record in my office, at 9.35 o'clock a. m., June 18th 1886 and is duly recorded in Book 21, at page 242. F. R. Lewis, recorder. Filed May 31, 1893. Robert Bailey, clerk.

STATE OF COLORADO, }
County of Dolores, } *ss:*

I, F. R. Lewis, county clerk and recorder in and for said county in the State aforesaid, do hereby certify the above and foregoing to be a full, true, and correct copy of the location certificate of the Jumbo Lode mining claim as appears upon the records of my office.

[SEAL.] Given under my hand and official seal this 8th day of April, A. D. 1892.

F. R. LEWIS,
County Clerk and Recorder,
By A. H. MUNDY, *Deputy.*

STATE OF COLORADO, }
County of Dolores, } *ss:*

Know all men by these presents, that, we, Edward H. Hackett, A. V. Gorla, Samuel Fleming, A. P. Adams, and A. Misch, the un-

dersigned have this 30th day of April, 1889, amended, located and claimed and by these presents do amend, locate and claim, by right of discovery and amended location in compliance with the mining acts of Congress, approved May 10, 1872, and all subsequent
159 acts, and with sec. 2409 of the General Laws of Colorado, and with local customs, laws and regulations 1,500 linear feet and horizontal measurement on the Jumbo lode, vein, ledge or deposit, along the vein thereof, with all it- dips, angles and variations, as allowed by law, together with 150 feet on each side of the middle of said vein at the surface, so far as can be determined from present developments, and all veins, lodes, ledges or deposits and surface ground within the lines of said claim, 6 feet running S. 1° 18′ W. from center of discovery tunnel and 1,494 feet running N. 1° 18′ E. from center of discovery tunnel said discovery tunnel being situate upon said lode, vein, ledge or deposit, and within the lines of said claim in Pioneer mining district, county of Dolores and State of Colorado, described by metes and bounds as follows, to wit:

Beginning at corner No. 1 an aspen post whence cor. No. 1 sur. No. 5804 Montezuma lode, bears S. 70° 12′ W. 367 ft. Mt. Elliott bears N. 27° 49′ W. Expectation Mt. bears N. 72° 14′ W. thence S. 1° 18′ W. 750 ft. to west side center 1,500 ft. to S. W. cor. No. 2, a spruce post whence a spruce stump 18 in. dia. marked + bears N. 43° W. 24.5 ft. Thence N. 88° 42′ E. 303 3 ft. to S. E. cor. No. 3 a spruce post whence a spruce stump 14 in. dia. marked + bears S. 20° E. 4 ft. Thence N. 1° 18′ E. 750 ft. to east side center 1,500 ft to N. E. cor. No. 4 an aspen post whence a spruce — 6 ins. dia marked + bears S. 24° E. 12 ft. Thence S. 88° 42′ W. 300.3 ft. to cor. No. 1 the place of beginning.

Said claim is situate on the west slope of Dolores Mt. about ¾ mile S. E. from the town of Rico. Va. 13° 30′ E.

This being the same lode originally located on the 20th day of March, 1886, and recorded on the 18th of June, 1886, in Book 21, page 242, in the office of the recorder of Dolores county, this further and amended certificate of location is made without waiver of any previously acquired rights, but for the purpose of correcting any errors in the original location, description or record.

EDWARD H. HACKETT. [SEAL.]
A. V. GORLA. [SEAL.]
SAMUEL FLEMING. [SEAL.]
A. P. ADAMS. [SEAL.]
A. MISCH. [SEAL.]

Said lo*a*d- was discovered the — day of ——, A. D. 18—.
Attest: A. E. ARNES,
U. S. Dep. Min. Surveyor.

Date of amended location, 20th March, 1886.
Date of amended certificate, April 30th, A. D. 1889.

160 Indorsed: 2827. Copy. Amended location certificate. On the Jumbo Lode mining claim of E. H. Hackett *et al.*, in

Pioneer mining district, Dolores county, State of Colorado. State of Colorado, county of Dolores, *ss:* I hereby certify that this amended location certificate was filed for record in my office at 10.20 o'clock a. m., May 2d, 1889, and is duly recorded in page 90, Book 26. F. R. Lewis, recorder. Filed May 31, 1893. Robert Bailey, clerk.

STATE OF COLORADO, } *ss:*
County of Dolores, }

I, F. R. Lewis, county clerk and recorder in and for said county, in the State aforesaid, do hereby certify the above and foregoing to be a full, true and correct copy of the amended location certificate of the Jumbo Lode mining claim as appears upon the records of my office.

Given under my hand and official seal this 8th day of
[SEAL.] April, A. D. 1892.

F. R. LEWIS,
County Clerk and Recorder,
By A. H. MUNDE, *Deputy.*

STATE OF COLORADO, } *ss:*
County of Dolores, }

Know all men by these presents, that, we, Edward H. Hackett, A. V. Gorla, Samuel Fleming, A. P. Adams and A. Misch, the undersigned, have this 21st day of May, 1889, amended, located and claimed, and by these presents do amend, locate, and claim*ed*, by right of discovery and second amended location in compliance with the mining acts of Congress, approved May 10, 1872, and all subsequent acts, and with sec. 2409 of the General Laws of Colorado, and with local customs, laws and regulations 1,500 linear feet and horizontal measurement on the Jumbo lode, vein, ledge or deposit, along the vein thereof, with all its dips, angles and variations, as allowed by law, together with 150 feet on each side of the middle of said vein at the surface, so far as can be determined from present developments, and all veins, lodes, ledges or deposits and surface ground within the lines of said claim 1,494 feet running northerly from center of discovery tunnel and 6 feet running southerly from center of discovery tunnel said discovery tunnel being situate upon said lode, vein, ledge or deposit and within the lines of said claim in Pioneer mining district, county of Dolores and State of Colorado, described by metes and bounds as follows, to wit:

Beginning at corner No. 1 a post and mound of stones whence a spruce stump 8 ins. dia. bears S. 3° 22′ E. 11.5 ft. Mt. Elliott
161 bears N. 27° 18′ W. Expectation Mt. bears N. 71° 40′ W. and cor. No. 1 of survey No. 5804 Montezuma lode bears S. 72° 25′ W. 362 ft. Thence, var. 13° 50′ E., S. 1° 18′ W. 1,498 ft. to cor. No. 2 a post and mound of stones, whence a spruce stump 18 ins. dia. bears N. 61° 10′ W. 31 ft. Thence S. 88° 42′ E. 300 ft. to cor. No. 3 a post and mound of stones, whence a spruce stump 12 ins. dia. bears S. 58° 35′ W. 12 ft. Telescope Mt. bears N. 19° 30′

E. Prominent peak bears S. 88° 30′ W. Thence N. 1° 18′ E. 1,035 ft. to cor. No. 4 a post and mound of stones. Thence N. 4° W. 465 ft. to cor No. 5 a post and mound of stones, whence an aspen stump 16″ *ins.* dia. bears N. 22° 30′ W. 34 ft. Thence N. 88° 42′ W. 257 ft. to place of beginning. Containing 10.088 acres of surface ground.

This being the same lode originally located on the 20th day of March, 1886, and recorded on the 25th day of May, 1886, in Book 21 page 242 in the office of the recorder of Dolores county, this further and amended certificate of location is made without waiver of any previously acquired right, but for the purpose of correcting any errors in the original location, description or record, and for the further purpose of correcting errors in the first amended location certificate filed May 2d, 1889, and found of record in Book 26 page 90 of the records of Dolores county, Colorado.

EDWARD H. HACKETT. [SEAL.]
A. V. GORLA. [SEAL.]
SAMUEL FLEMING. [SEAL.]
A. P. ADAMS. [SEAL.]
A. MISCH. [SEAL.]

Said lode was discovered the 20th day of March, A. D. 1886.
Date of amended location March 20th, 1886.
Date of second amended certificate May 21st, A. D. 1889.

Indorsed: 2827. Copy. Second amended location certificate. On the Jumbo mining claim of E. H. Hackett *et al.* in Pioneer mining district, Dolores county, State of Colorado. State of Colorado, county of Dolores, *ss:* I hereby certify that this amended location certificate was filed for record in my office 8.45 p. m. May 21st, 1889, and is duly recorded in page 91 Book 26. F. R. Lewis, recorder. Filed May 31, 1893. Robert Bailey, clerk.

STATE OF COLORADO, }
County of Dolores, } *ss:*

I, F. R. Lewis county clerk and recorder in and for said county in the State aforesaid, do hereby certify the above and
162 foregoing to be a full, true and correct copy of the second amended location certificate of the Jumbo Lode mining claim as appears upon the records of my office.

Given under my hand and official seal this 8th day of
[SEAL.] April, A. D. 1892.

F. R. LEWIS,
County Clerk and Recorder,
By A. H. MUNDEE, *Deputy.*

This agreement, made this third day of March, A. D. 1890, by and between the owners of the "Song Bird" Lode mining claim, the "Hiawatha" Lode mining claim, the "Thompson" Lode mining claim, the "Jumbo" Lode mining claim, the "Old Discovery" Lode mining claim, and the "Montezuma" Lode mining claim, all

situated in Pioneer mining district, county of Dolores and State of Colorado, witnesseth:

That whereas there has heretofore existed controversies and lawsuits among the owners of said claims owing to conflicts of boundaries as between said claims, and whereas, said claims conflicted with each other and each claim asserted ownership in ground within the boundary lines of another or others of said claims. And, whereas under the statutes of the United States several and divers suits were brought in the district court of the sixth judicial district of the State of Colorado, in and for the county of Dolores, to confirm and settle the titles of the different claims to said conflicting areas of ground. And, whereas in consideration of the premises and in order to settle the titles to all of said claims and all of the ground in conflict, the parties hereto have settled and compromised said suits, and have caused judgment to be entered in said suits in accordance with said compromise.

And, whereas, in making that compromise, and in settling those suits and controversies, and thus fixing the boundary lines of the said claims, certain other agreements have been entered into between the parties hereto in order to effectually settle such conflicting claims, which agreements and stipulations it was impossible to embody in the said compromise, other than by written agreement between the parties.

Wherefore, it has become necessary to execute this agreement; wherefore, in consideration of the premises and of said compromise, it is hereby understood and agreed by and between the owners of the said described lode mining claims, as follows, to wit: That neither the present nor the future owners of any of the lode mining claims hereinbefore mentioned may change the lines of any
163 of said claims, or make any relocations of future locations of mining ground to the prejudice or injury of any other one or more of said mining claims, by reason of cross-veins, newly discovered veins, or otherwise; but as among the present or future owners of said lode mining claims, and each of them, each mining claim above mentioned shall be entitled to all surface ground and everything therein and thereunder from the surface to the center of the earth, within the compromise boundaries of each mining claim, extending downward vertically, said boundaries to be described by the present location on the ground of each claim taken in connection with the description of the ground belonging to each claim, as found in the judgment made in said adverse suits.

It is further understood and agreed that in the event the "Montezuma #2" Lode mining claim shall be held to be a good and valid claim, and to any extent of territory whatever, then the said "Montezuma #2" Lode mining claim shall be included within this agreement upon the same terms and stipulations as the other lode mining claims herein mentioned.

In witness whereof, the said owners of the said lode mining claims

have hereunto set their hands and seals on the day and year first above mentioned.

E. H. HACKETT.	[SEAL.]
E. L. DAVIS.	[SEAL.]
A. H. MUNDEE.	[SEAL.]
JULIUS THOMPSON.	[SEAL.]
FRANK W. INGERSOLL.	[SEAL.]
LAURA D. SWICKHIMER.	[SEAL.]
DAVID SWICKHIMER.	[SEAL.]
A. P. ADAMS.	[SEAL.]
SAMUEL FLEMING.	[SEAL.]

STATE OF COLORADO, } ss:
County of Dolores, }

I, F. R. Lewis, clerk of the district court of the sixth judicial district of the State of Colorado, within and for the county of Dolores, do hereby certify that E. L. Davis, A. H. Mundee, E. H. Hackett, Julius Thompson, Frank W. Ingersoll, A. P. Adams, Samuel Fleming, David Swickhimer and Laura D. Swickhimer, each of whom is to me personally known to be the identical person who is mentioned in and who signed the foregoing instrument in writing, each personally appeared before me on this 10th day of March, A. D. 1890, and each acknowledged that he signed, sealed delivered and executed the within and foregoing instrument of his
164 own will and voluntary —, for the uses and purposes herein set forth.

In witness whereof I have hereunto set my
[SEAL OF COURT.] hand and affixed the seal of said court on this 10th day of March, A. D. 1890.

F. R. LEWIS,
Clerk District Court.

Indorsed: 2827. Rico-Aspen Con. Mining Co. *et al. v.* Enterprise Mining Co. Complainant's exhibit on hearing. Filed May 4, 1893. Robert Bailey, clerk. C. J. Hughes, Jr., R. S. Morrison, C. S. Thomas, for pl'ffs.

Declaration of Title.

This indenture made and executed this 23rd day of July, 1890, by and between David Swickhimer, Laura D. Swickhimer, A. P. Adams, W. E. So Relle, W. G. Barnett, Julius Thompson and Frank W. Ingersoll, all of the county of Dolores, and John Kinkaid of the county of Ouray, State of Colorado,

Witnesseth:

That in consideration of the premises and for the purpose of compromising all difficulties and controversies present and future between or among the parties hereto and for the purpose of settling absolutely the title to all the property hereinafter described it is understood and agreed by and between all the parties hereto that

the right, title and interest of each of said parties in and to the Contention Lode mining claim, the Fat Boy Lode mining claim, the N and G Lode mining claim, the Vestal Lode mining claim and the Compromise Lode mining claim, all situated adjacent to each other on the west slope of Dolores mountain in Pioneer mining district in the county of Dolores State of Colorado, for a fuller and more complete description whereof reference is hereby made to the records of the respective location certificates of each of said lode mining claims to be found of record in the records of said Dolores county as follows, to wit:

The location certificate of the Contention Lode mining claim in Book 21 at page 292.

The location certificate of the Fat Boy Lode mining claim in Book 21 at page 331.

The location certificate of the N and G Lode mining claim in Book 21 at page *of* 284.

The location certificate of the Vestal Lode mining claim in Book 21 at page 396.

165 The location certificate of the Compromise Lode mining claim — 36 at page 127 is as follows, to wit:

David Swickhimer is the owner of fifteen per cent. of said right, title and interest; Laura D. Swickhimer is the owner of fifteen per cent. thereof; A. P. Adams is the owner of twenty-seven and three-tenths per cent. thereof; W. E. So Relle is the owner of nineteen and two-tenths per cent. thereof; W. G. Barnett is the owner of thirteen and three-tenths per cent. thereof; Julius Thompson is the owner of five and one-tenth per cent. thereof; Frank W. Ingersoll is the owner of five and one-tenth per cent. thereof, it being the intention to divide the whole title of each of said lode mining claims among the parties hereto in the above proportions, each of the parties hereto to have and to hold the above interest in each of said lode mining claims to himself his heirs and assigns forever.

It is further understood and agreed by and between the parties hereto that this indenture shall operate as a deed of conveyance of the above interests in each of said lode mining claims to each of the parties herein by the owners of record of each of said lode mining claims.

It is further understood and agreed by and between the parties hereto that although certain parties herein do not appear at present of record as owners in one more or any of the above-described lode mining claims it is conceded such parties do hold equitable or potential interests in said lode mining claims and this declaration of title is made for the purpose of settling and compromising all such interests, present or future and is intended as a declaration of title in and to all of said lode mining claims. In consideration of the premises it is understood and agreed by and between the parties hereto that the boundary lines of the said lode mining claims hereinbefore described and each of them shall be the limit of all rights in said ground and that each and every party hereto for himself, his heirs, administrators, executors and assigns covenants and agrees that they will not pass beyond said boundary lines underground

either way either by virtue of this indenture or by virtue of any right, title or interest in or to any mining claim or otherwise that he or they may now have or hereafter acquire by virtue of an apex or cross vein or otherwise.

It is further understood and agreed that this indenture is intended to make the parties hereto owners of record in each of the above-described lode mining claims from the date hereof and no act of the parties hereto or instrument in writing of any kind or character now on record shall affect the right title and interest of any person hereto in and to any of said lode mining claims hereinbefore described according to his interests as above set forth, and

166 Whereas the said W. G. Barnett has heretofore given an option of purchase upon his interest in the above-described lode mining claims to one John Kinkaid,

Now therefore in consideration of the premises it is understood and agree- that said option of purchase is subject to the terms and conditions of this declaration of title and that said option of purchase shall take effect upon the interests of said W. G. Barnett herein by substitution to all intents and purposes as if the interests of said Barnett as above set forth were described in said option in the place and stead of the interests therein described.

Whereas, the parties hereto have on this date entered into a written agreement with one Albert O. Headley with reference to the property above described, which agreement is in writing and is hereby referred to.

Now therefore it is fully understood by and between all the parties hereto that in the event the said Headley receives a conveyance as provided for in said contract then this indenture and all the terms thereof to be and remain in full force and effect and in the event the said Headley does not receive such conveyance by virtue of a full compliance with all the terms of said contract then this contract with all the terms therein contained and the declaration of title to be null and void and of no effect the same as if this declaration of title had never been executed by any of the parties hereto.

In witness whereof the parties have hereunto set their hands and seals this 23rd day of July, 1890.

(Signed)	LAURA D. SWICKHIMER.
"	DAVID SWICKHIMER.
"	FRANK W. INGERSOLL.
"	JULIUS THOMPSON.
"	W. E. SO RELLE.
"	A. P. ADAMS.
"	W. G. BARNETT.
"	JOHN KINKAID.

Indorsed: 2827. Rico-Aspen Con. Mining Co. *et al. v.* Enterprise Mining Company. Complainant's exhibit on hearing. Filed May 4, 1893. Robert Bailey, clerk. C. J. Hughes, Jr., R. S. Morrison, C. S. Thomas, for pl'ff.

167 UNITED STATES OF AMERICA, } ss:
District of Colorado, }

Affidavit of Geo. M. Yeakel.

In the United States Court within and for the District of Colorado.

THE RICO-ASPEN CONSOLIDATED MINING COMPANY, a Corporation, Plaintiff,
vs.
THE ENTERPRISE MINING COMPANY, a Corporation, Defendant.

STATE OF COLORADO, } ss:
County of Dolores, }

George M. Yeakel, being first duly sworn according to law, upon his corporal oath deposes and says:

I am employed as a miner by the Enterprise Mining Company in its mines on Newman hill, in Pioneer mining district Dolores county, Colorado. On September 1st, 1892, I went on duty at three o'clock in the afternoon and went to work in the face of the drift upon the vein of the "Jumbo No. 2" Lode mining claim, which is reached through a cross-cut from the Group tunnel. The morning shift had been working at the breast of this drift and had almost broken through into some workings made by the Rico-Aspen Consolidated Mining Company's men. We could hear the men at work in these workings and could converse with them. We put in four holes and loaded them. When they were loaded W. J. Grandstaff said: Let me talk to these men in there and give them a signal. I heard him tell them to get back that we were going to fire four holes. I started back in the drift with the tools and did not hear the men answer back.

When we went back to the breast Mr. Kirby came in and said: "Boys I don't want you to hurt anybody, but hold possession of this part of the Jumbo mine."

GEO. M. YEAKEL.

Subscribed and sworn to before me this 9th day of September, A. D. 1892.
[SEAL.]

WILLIAM B. HESS,
Notary Public.

My commission expires May 6th, 1894.

Indorsed: 2827. U. S. circuit court. The Rico-Aspen C. M. Co. *et al.*, plaintiffs, *vs.* The Enterprise M. Co., defendant. Affidavit of Geo. M. Yeakel, for def't. Filed Sep. 20, 1892. Robert Bailey, clerk U. S. circuit court.

168 UNITED STATES OF AMERICA, } ss:
District of Colorado, }

In the United States Court within and for the District of Colorado.

THE RICO-ASPEN CONSOLIDATED MINING COMPANY, a Corporation, Plaintiff,
vs.
THE ENTERPRISE MINING COMPANY, a Corporation, Defendant.

STATE OF COLORADO, } ss:
County of Dolores, }

James Dockery, being first duly sworn, upon his oath deposes and says: I am thirty-two years of age. I am employed by the Enterprise Mining Company as a miner upon their properties on Newman hill, in Pioneer mining district, Dolores county, Colorado. On September 1st, 1892, I came on shift about six o'clock in the evening and went into the drift upon the "Jumbo No. 2" Lode mining claim, reached from and through the Group tunnel. I was in at the face of the drift a short while when Mr. Morgan, shift boss of the mine, came in with Robert Williams and George Yeakel and put them to work in the face of the drift. The shift before them had been taken away from the breast of the drift in the morning and work stopped. He told me to stay there with the men as he had to go around in other parts of the mine. Yeakel started in to drill a hole in the breast of the drift and the other man one at the bottom. They got the holes ready to load when Mr. Kirby, the superintendent of the mine came in and said, "Boys be very careful and don't hurt anybody. If you can possibly hold the workings, do so, but don't hurt anybody whatever you do." We said all right. We loaded up the holes and W. J. Grandstaff, who was on guard at the face of the drift said he would give the men who were working for the Rico-Aspen Co. warning that we were going to shoot. In the morning of this day a small hold had been broken through into some workings made by the Rico-Aspen Co. from the breast of this drift and through this we could hear their men working and could converse with them and be understood. When our men went to work under Mr. Morgan's instructions, the Rico-Aspen Co.'s men ordered them to quit work and go away from there and not come back. I asked them why, but they made no response. They said when we shoot you fellows get out of the way. We said all right.

When we got ready to load the holes Grandstaff called to the other men that we were going to shoot four holes. We could hear them when talking in an ordinary tone of voice. I heard
169 them ask Grandstaff if they were very heavy holes. He said yes, pretty heavy holes. Grandstaff told them to get away from there and not to come back. One of the — laughed and said "Let 'er go." All of us then went back in the drift except the man who lighted the shots. When we came back after the shots were fired, only three of which went off, we found that they had not

broken through into their workings I then went into the face of the drift and thought I heard them coming back to work. I shouted to them not to come down there, but got no reply. I stayed at the face of the drift quite a little while and then went back in the drift to let the smoke clear away. Then Tom Burns and myself went back to the face of the drift and found what we call a natural hold and concluded to load it. We got the powder and fuse and got back to the breast when the Aspen men shouted "Fire." We answered all right and then went back in the drift. We waited, I suppose ten minutes or more for their fire, but they did not fire and we then went back to the breast and began to load the hole. Burns asked them what they meant by fooling us about that shot as it was not right. They replied "Oh, I don't know partner." When we got the hole loaded, we told them we were going to shoot a heavy hole. They asked us if it was a heavy one and Burns said "Yes, a damned heavy hole." They said "All right, let her go." We tamped the hole and then all got back and fired the hole. Fully four and perhaps seven minutes elapsed between the warning and the firing of the shot.

I have since talked with Robert McCullough, who was one of the men on the other side, employed by the Rico-Aspen Co. and in the workings above mentioned at the firing of the last shot, and he said the reason they did not go back any further in their drift after the warning was given was that when we fired the other shots we said they were heavy holes and they thought they need not go further back than they went then.

After the firing of the last shot Mr. Morgan came in and told me to go with him; that the Rico-Aspen Co.'s men were trying to fire the "Jumbo" mine from the "Montezuma" and smoke us out. I went to this drift connecting the "Jumbo" and "Montezuma" workings and we started in to fill up the manways and chutes in the Jumbo. We worked there along for a couple of hours filling in the manways and chutes trying to keep them from getting through, but they drew an old stope and got a hole through and the smoke from their fire which they had built came through pretty thick. We stayed there trying to check that hole until the smoke became so thick that we could not see and it drove us back. Three of our men
170 got back to the level and found that — rest of the boys had not got back. We went back and brought them down. They had to put handkerchiefs to their mouths to keep from suffocating.

Then the morning shift came on and I went off duty about nine o'clock.

JAMES E. DOCKERY.

[SEAL.] Subscribed and sworn to before me this 9th day of September, A. D. 1892.

WM. B. HESS,
Notary Public.

My commission expires May 6th, A. D. 1894.

Indorsed: 2827. U. S. circuit court. The Rico-Aspen C. M. Co. *et al.*, plaintiffs, *vs.* The Enterprise M. Co., defendant. Affidavit of James E. Dockery, for def't. Filed Sep. 20, 1892. Robert Bailey, clerk U. S. court.

UNITED STATES OF AMERICA, }
District of Colorado, } ss:

Affidavit of Nick Welsh.

In the United States Court within and for the District of Colorado.

THE RICO-ASPEN CONSOLIDATED MINING COMPANY, a Corporation, Plaintiff,
vs.
THE ENTERPRISE MINING COMPANY, a Corporation, Defendant.

STATE OF COLORADO, }
County of Dolores, } ss:

Nick Welsh, being first duly sworn, upon his corporal oath deposes and says: I am 22 years of age; I am employed by the Enterprise Mining Company as a miner in its mines on Newman hill, in Pioneer mining district, Dolores county, Colorado. On September 1st, 1892, between the hours of eight o'clock and eleven o'clock at night I was in the drift run on the vein of the "Jumbo No. 2" Lode mining claim run from the cross-cut in the Group tunnel, owned by said company. At the time I went in four holes had been loaded in the breast of the drift. The men at work were about to fire them. I heard them shout "Fire! Four holes." I could hear the men working for the Rico-Aspen Consolidated Mining Company in some workings made by them which had par-
171 tially been broken into by our workings during the same day. I was back in the drift and could not hear the answer made by the Aspen men. A man by name of Grandstaff shouted to the men that "We are going to fire four holes; get out of there and don't come back any more." After the warning was given I could not hear what reply was made, but they left their workings and the holes were fired and I went out of the drift.

Our instructions from Mr. Kirby the superintendent were at all times not to hurt anybody whatever we did.

NICK WELSH.

Subscribed and sworn to before me this 9th day of September, A. D. 1892.

[SEAL.] WILLIAM B. HESS,
Notary Public.

My commission expires May 6th, 1894.

Indorsed: 2827. U. S. circuit court. The Rico-Aspen C. M. Co., *et al.*, plaintiffs, *vs.* The Enterprise M. Co., defendant. Affidavit of Nick Welsh, for def't. Filed Sep. 20, 1892. Robert Bailey, clerk U. S. circuit court.

UNITED STATES OF AMERICA, }
District of Colorado, } ss:

Affidavit of Thomas Burns.

In the United States Court within and for the District of Colorado.

THE RICO-ASPEN CONSOLIDATED MINING COMPANY, a Corporation, Plaintiff,
vs.
THE ENTERPRISE MINING COMPANY, a Corporation, Defendant.

STATE OF COLORADO, }
County of Dolores, } ss:

Thomas Burns, being first duly sworn, upon his oath deposes and says: I am thirty-four years of age. I am employed by the defendant company as a miner. I have been engaged in the business of a miner for the past eighteen years. On September 1st, 1892, I was called to the Jumbo mine and went to work in the drift which finally broke through into the workings of the Rico-Aspen Company on that date. I was working moving timbers until about eleven o'clock, when I went to work in the breast of the drift.
172 When I went to work three shots had been fired in the breast of the drift which had not broken through into the plaintiff company's workings and I went to work picking down the loose rock broken up by the shots. I found an old hole and James Dockery and I proceeded to load it. Before tamping the hole I shouted to the plaintiff company's men to get out of there we had a heavy hole to fire. They did not answer. I shouted again that we had a heavy hole loaded and for them to get out and not come back there. They asked if it was a heavy hole and I replied, "Yes, a damned heavy hole." They replied, "All right, turn her loose." About seven minutes after the warning we fired the shot. I was careful to give the warning and to get a reply for our instructions from Mr. Kirby, the superintendent, were to fire no shots until we had warned the men in the other drift and to get a response from them and not to hurt anybody whatever we did.

This was the last shot fired while I was on shift. It broke through into the winze sunk by the plaintiff company. The shot was put off in a natural hole made by the three shots which had been fired previous to it, and as the ground was loose and broken up it required a heavier shot to have any effect upon it. The shot was not an unusually heavy one for that kind of a hole and the character of the ground. The hole was a flat one and could not and did not throw any rock or debris upward, but the force of the charge would necessarily have been horizontally either into their workings or ours. It broke down about two feet of ground. The length of the winze connecting the drict of the plaintiff company with that in which we were working is between thirty and forty feet. I remained in the drift until about six o'clock in the morning when Foreman

Morgan came in and took me to the drift connecting the Jumbo workings with the Montezuma, owned by the plaintiff company. Here the plaintiff company were trying to get a hole through into our workings and had built a fire and were trying to smoke us out. The smoke was pouring into our workings and was so thick we could not see. I went up into an upraise to pilot some of our men out who had been shut in by *by* the smoke and could not find their way out. We were driven out by the smoke. After trying to check the smoke from coming into our workings, about seven o'clock in the morning I went off duty.

THOMAS BURNS.

Subscribed and sworn to before me this 9th day of September, A. D. 1892.

[SEAL.] WILLIAM B. HESS,
Notary Public.

My commission expires May 6th, 1894.

173 Indorsed: 2827. U. S. circuit court. The Rico-Aspen C. M. Co. *et al.*, plaintiffs, *vs.* The Enterprise M. Co., defendant. Affidavit of Thomas Burns, for def't. Filed Sep. 20, 1892. Robert Bailey, clerk U. S. circuit court.

UNITED STATES OF AMERICA, } ss:
District of Colorado, }

Affidavit of Alex. J. Tozer.

In the United States Court within and for the District of Colorado.

THE RICO-ASPEN CONSOLIDATED MINING COMPANY, a Corporation, *et al.*, Plaintiffs,
vs.
THE ENTERPRISE MINING COMPANY, a Corporation, Defendant.

STATE OF COLORADO, } ss:
County of Dolores, }

Alexander J. Tozer, of lawful age, being first duly sworn, upon his oath deposes and says: I am thirty-six years of age, reside at Rico, Colorado, and am in the employ of the defendant company as a miner; I went to work on the morning of September 1st, 1892, and was stationed in the breast of the drift on Jumbo No. 2 vein in which afterward the same day a connection was made with a winze made by the Rico Aspen Company. We were driving this drift ahead and about two o'clock in the afternoon a shot which we put in shattered the ground separating these two workings so that the air rushed through. It caused a fracture of the ground between the workings through which we could hear what was going on on the other side and could understand one speaking in an ordinary tone of voice. The Rico-Aspen men called out to us not to break through but to stop work that they had air enough. I asked them

how they proposed to stop us whether by force or legal means, to which they made no reply. About this time Mr. Kirby, the superintendent of the mine came in and he concluded that unless the Rico-Aspen men undertook to break down ore in the workings not to interfere with their working but instructed us to stop working for the present and leave things in their present shape.

I was stationed in the drift as a guard to prevent their men from taking possession of the workings in case we broke
174 through into them. Nothing of importance transpired before I went off duty.

ALEXANDER J. TOZER.

[SEAL.] Subscribed and sworn to before me this 10th day of September, A. D. 1892.

WILLIAM B. HESS,
Notary Public.

My commission expires May 6th, 1894.

Indorsed: 2827. U. S. circuit court. The Rico-Aspen C. M. Co. *et al.*, plaintiffs, *vs.* The Enterprise M. Co., defendant. Affidavit of Alex. J. Tozer, for def't. Filed Sept. 20, 1892. Robert Bailey, clerk U. S. circuit court.

UNITED STATES OF AMERICA, *District of Colorado*, } *ss:*

Affidavit of Robert Williams.

In the United States Court within and for the District of Colorado.

THE RICO-ASPEN CONSOLIDATED MINING COMPANY, a Corporation, *et al.*, Plaintiffs,
vs.
THE ENTERPRISE MINING COMPANY, a Corporation, Defendant.

STATE OF COLORADO, *County of Dolores*, } *ss:*

Robert Williams, of lawful age, being first duly sworn, according to law, upon his oath deposes and says: I am forty-eight years of age; am employed by the defendant company as a miner. On the 1st of September, 1892, I went to work at 3.00 p. m. and worked until 10.30 the same night. I had been working in the drift which was broken through into the winze made by plaintiff company's men. We had loaded four holes and warned the men in the winze that we were going to fire four holes, they said all right let her go. Grandstaff, who was on guard there in the drift told them to get out of there and not come back any more in the winze. When standing at the breast of the drift you could hear them plainly working in the winze and could hear them when talking.

We had orders from the mine officers not to fire any shots without giving them notice and getting a response to our signal.

Our orders were at all times to use no force or violence and not to injure any one in holding possession of the works.

ROBERT WILLIAMS.

[SEAL.] Subscribed and sworn to before me this 10th day of September, A. D. 1892.

WILLIAM B. HESS,
Notary Public.

My commission expires May 6th, 1894.

Indorsed: 2827. U. S. circuit court. The Rico-Aspen C. M. Co. *et al.*, plaintiffs, *vs.* The Enterprise M. Co., defendant. Affidavit of Robert Williams for def't. Filed Sep. 20, 1892. Robert Bailey, clerk U. S. circuit court.

UNITED STATES OF AMERICA, } ss:
District of Colorado, }

Affidavit of Andrew Kelly.

In the United States Court within and for the District of Colorado.

THE RICO-ASPEN CONSOLIDATED MINING COMPANY, a Corporation, *et al.*, Plaintiffs,
vs.
THE ENTERPRISE MINING COMPANY, a Corporation, Defendant.

STATE OF COLORADO, } ss:
County of Dolores, }

Andrew Kelly, of lawful age, being first duly sworn according to law, upon his oath deposes and says: I am thirty-four years of age, a miner by occupation and reside at Rico, Colorado. On the evening of September 6th, 1892, I heard Robert McCullough talking opposite the Lobby saloon, on the corner of Mantz avenue and Glasgow avenue, in the town of Rico, Colorado. He said he was one of the party working with and under Mr. Lee Woods, a foreman of the plaintiff company on the night of September 1st last at the time when Mr. Woods is said to have been injured, by a blast in the Enterprise workings. He said that they all heard and understood the warning given by the Enterprise men that they intended to fire a shot, but that they thought the shot would be only a small one and did not go back as far as they should otherwise have done; that all of their party went back into their main drift at the time of the warning from the Enterprise men, except Mr. Woods, who stood in front of them and in or in front of the short cross-cut leading to the winze at the bottom of which the shot was fired.

176 There were four or five men present at the time Robert McCullough made this statement of whom the only one I knew was Thomas Burns and Matt. Ryan.

ANDREW KELLY.

[SEAL.] Subscribed and sworn to before me this 10th day of September, A. D. 1892.

WILLIAM B. HESS,
Notary Public.

My commission expires May 6th, 1894.

Indorsed: 2827. U. S. circuit court. The Rico-Aspen C. M. Co. *et al.*, plaintiffs, *vs.* The Enterprise M. Co., defendant. Affidavit of Andrew Kelly for def't. Filed Sep. 20, 1892. Robert Bailey, clerk U. S. circuit court.

UNITED STATES OF AMERICA, *District of Colorado,* } *ss:*

Affidavit of Alford C. Woodruff.

In the United States Court within and for the District of Colorado.

THE RICO-ASPEN CONSOLIDATED MINING COMPANY, a Corporation, Plaintiff,
vs.
THE ENTERPRISE MINING COMPANY, a Corporation, Defendant.

STATE OF COLORADO, *County of Dolores,* } *ss:*

Alford C. Woodruff, of lawful age, being first duly sworn, upon his corporal oath deposes and says: I am forty-five years of age. I am employed by the defendant company as a miner. On September 1st, 1892, I was working in the Enterprise mine on the Hiawatha drift. I went on duty at three o'clock in the afternoon. Between nine and ten o'clock that night, the night foreman Charles Fry, came to me and said they wanted me to go down to the Jumbo mine; that the Rico-Aspen people were trying to take possession of the mine and that they wanted me to help to hold possession, against them. We came down and went into the Jumbo mine in the drift connecting the workings of the "Jumbo" with those of the "Montezuma" mine. We there erected a bulkhead to prevent entrance into the workings of the Jumbo. I was then taken out and
177 put on guard at the mouth of the Group tunnel. My instructions from the mine officers were not to injure any one if it could be avoided, but to protect the company's property.

ALFORD C. WOODRUFF.

[SEAL.] Subscribed and sworn to before me this 10th day of September, A. D. 1892.

WILLIAM B. HESS,
Notary Public.

My commission expires May 6th, 1894.

Indorsed: 2827. U. S. circuit court. The Rico-Aspen C. M. Co. *et al.*, plaintiffs, *vs.* The Enterprise M. Co., defendant. Affidavit of Alford C. Woodruff for def't. Filed Sep. 20, 1892. Robert Bailey, clerk U. S. circuit court.

UNITED STATES OF AMERICA, } ss:
District of Colorado, }

Affidavit of W. J. Grandstaff.

In the United States Court within and for the District of Colorado.

THE RICO-ASPEN CONSOLIDATED MINING COMPANY, a Corporation, *et al.*, Plaintiffs,
vs.
THE ENTERPRISE MINING COMPANY, a Corporation, Defendant.

STATE OF COLORADO, } ss:
County of Dolores, }

W. J. Grandstaff, being first duly sworn, upon his oath deposes and says: I am employed by the defendant company as a miner; I was on duty at the mine on the night of September 1st, 1892. I went into the drift on the "Jumbo No. 2" vein, owned by the defendant company, the breast of which was broken through that night into the winze of the plaintiff company. I was working in the drift. About 10.00 or 11.00 o'clock we had fired some shots. I warned the men of the plaintiff company that we were going to fire some holes and for them to get out and stay out and not come back. It was only a small distance between the breast of this drift and the winze of the plaintiff company in which their men were working and I could hear them at work plainly and could hear and understand them when talking. They laughed sarcastically and
178 said "Let 'er go Gallagher," or something to that effect. These shots were fired some little time after the warning was given. Some little time elapsed between the firing of the shots and our return into the drift at the breast on account of the smoke. When we got back to the breast they shouted fire. We went back out of the way and they still kept to work and did not fire any shots. We then loaded another hole in the breast of the drift. After it was loaded and before it was tamped I told the men not to fire it until we had warned the men on the other side and got an answer from them. Tom Burns called to them that we were going to fire one hole. They asked if it was a big shot. He said Yes, a devil of a big shot, or something to that effect and to get out and stay out. The hole was then tamped, which took some little time and we again shouted fire, but received no answer. They had stopped working and we went back in the drift out of the way and the hole was fired. It broke through into the winze made by the plaintiff company where the men had been at work.

My instructions from the mine officers were not to injure any one, but to hold possession of the workings.

W. J. GRANDSTAFF.

Subscribed and sworn to before me this 10th day of September, 1892.

[SEAL.]

WILLIAM B. HESS,
Notary Public.

My commission expires May 6th, 1894.

Indorsed: 2827. U. S. circuit court. The Rico-Aspen C. M. Co. *et al.*, plaintiffs, *vs.* The Enterprise M. Co., defendant. Affidavit of W. J. Grandstaff for def't. Filed Sept. 20, 1892. Robert Bailey, clerk U. S. circuit court.

UNITED STATES OF AMERICA, *District of Colorado,* } ss:

Affidavit of Alonzo P. Davis.

In the United States Circuit Court within and for the District of Colorado.

RICO-ASPEN CONSOLIDATED MINING COMPANY, a Corporation, *et al.*, Plaintiffs,
vs.
THE ENTERPRISE MINING COMPANY, a Corporation, Defendant.

STATE OF COLORADO, *County of Dolores,* } ss:

Alonzo H. Davis, of lawful age, being first duly sworn according to law, upon his oath deposes and says: I am thirty-one
179 years of age. I am a miner by occupation and reside at Rico, Colorado. On the evening of September 5th, 1892, in the town of Rico, I had a conversation with W. J. Lane and one Bishop, employés of the plaintiff company. Both men told me that they were with the party of Rico-Aspen men working under Mr. Lee Woods, foreman, on the night of September, 1st, last, when it is said Mr. Woods was injured by the firing of the shot by the Enterprise men. Lane said to me that they had been warned of the shot and that at the time the shot went off they were coming back to the winze. Wood was in front and Lane was directly behind him. He said they were creeping back toward the winze stealthily. I asked him if they had not received notice and he said yes, but it had been so long that they thought the shot was not going off.

I also had a talk with Bishop. He said that he had been called to the mine at eleven o'clock and was putting in an air pipe in the main drift from which the cross-cut was run by the Rico-Aspen people and a winze sunk from this cross-cut which is the winze connecting the workings of the Rico-Aspen Co. with the drift of the Enterprise Company. He asked for a light and Wood stepped into the cross-cut to get the light when the explosion occurred. Said they had received the warning and had gone out into the main drift to wait for it to go off.

ALONZO H. DAVIS.

[SEAL.] Subscribed and sworn to before me this 10th day of September, A. D. 1892.

WILLIAM B. HESS,
Notary Public.

My commission expires May 6th, 1894.

Indorsed: 2827. U. S. circuit court. The Rico-Aspen C. M. Co., *et al.*, plaintiffs, *vs.* The Enterprise M. Co., defendant. Affidavit of Alonzo P. Davis, for def't. Filed Sep. 20, 1892. Robert Bailey, clerk U. S. circuit court.

180 UNITED STATES OF AMERICA, } ss:
District of Colorado, }

Affidavit of Thomas Kane.

In the United States Court within and for the District of Colorado.

THE RICO-ASPEN CONSOLIDATED MINING COMPANY, a Corporation, *et al.*, Plaintiffs,
vs.
THE ENTERPRISE MINING COMPANY, a Corporation, Defendant.

STATE OF COLORADO, } ss:
County of Dolores, }

Thomas Kane, of lawful age, being first duly sworn, according to law, upon his corporal oath deposes and says: I am thirty-six years of age, I am employed by the defendant company as foreman. I went on duty at seven o'clock in the morning of September 1st, 1892. About five o'clock in the afternoon I went into the drift on the Jumbo No. 2 vein which is the drift which on the same date was broken through into the winze made by the plaintiff company's men. About 2.30 p. m. our men had been ordered to stop work in the drift by the plaintiff company's men and were taken away temporarily and nothing done in the drift that afternoon.

About seven thirty that same evening, the night foreman came downtown and met me outside of the Enterprise office and told me that the Rico Aspen men had refused to allow our men to go to work in the face of the drift and *and* that they were guarding the connections between the Jumbo and Montezuma mines. Mr. Kirby and I went up to the mine and went into the drift in question and we stayed there until those holes were loaded and fired. When these holes were about ready to be fired, the guard at this point, Mr. W. J. Grandstaff, called to the men on the other side that we were going to fire four holes and to get back and stay back. After these holes were fired I went on through the mine and went out and downtown.

About five o'clock the next morning a man woke me up and said the night boss on the mine wanted — up there as soon as possible that Rico-Aspen men were breaking into the Jumbo workings from

the workings of the Montezuma mine. When we got up to the mine we found that the Rico-Aspen men had started a large fire in the Montezuma workings and were trying to drive the smoke into the Jumbo workings and drive us out. The smoke was pouring into our workings and we were driven back some distance into the mine. We stayed there all day trying to keep out the smoke and check it.

181 Deponent further says: I have been engaged in mining on Newman hill for three years last past. I am familiar with the character of lodes and ore deposits in the veins on this hill and the formation generally. I have examined the vein cut by the Group tunnel, owned by the defendant company, and called the "Jumbo No. 2" vein and the vein in the drift run from a cross-cut from this Group tunnel, being the same drift in which a connection was made on the night of September 1st, with the winze of the plaintiff company. I am familiar with the ore in the vein at both places and the character of the ore and vein matter is the same and in my opinion the*y* vein disclosed by each of these workings is one and the same vein and I verily believe from these facts and from the trend of the vein as disclosed by these workings that if they were extended they would connect.

Several upraises have been made in the drift in which the connection with the plaintiff company's workings was made as herein set out, and in each and all of them the vein has given out and ceased when it reached the contact overlying the same, and it does not extend upward to the surface or crop out thereon. It is in my opinion a blind vein and the same which was cut by the Group tunnel, as aforesaid.

THOS. KANE.

[SEAL.] Subscribed and sworn to before me this 10th day of September, A. D. 1892.

WILLIAM B. HESS,
Notary Public.

My commission expires May 6th, 1894.

Indorsed: 2827. U. S. circuit court. The Rico-Aspen C. M. Co., *et al.*, plaintiffs, *vs.* The Enterprise M. Co., defendant. Affidavit 1 of Thomas Kane, for def't. Filed Sept. 20, 1892. Robert Bailey, clerk U. S. circuit court.

UNITED STATES OF AMERICA, } ss:
District of Colorado, }

Affidavit of Lloyd Morgan.

In the United States Court within and for the District of Colorado.

THE RICO-ASPEN CONSOLIDATED MINING COMPANY, a Corporation, *et al.*, Plaintiffs,
vs.
THE ENTERPRISE MINING COMPANY, a Corporation, Defendant.

STATE OF COLORADO, } ss:
County of Dolores, }

Lloyd Morgan, of lawful age, being first duly sworn according to law, upon his oath deposes and says: I am thirty-six years of age. Am employed by the defendant company as night foreman at the Group tunnel. I was on duty Thursday, September 1st, 1892, between the hours of 6.30 p. m. and 7.00 o'clock the next morning. I went into the drift which was broken through into the winze made by the plaintiff company about eleven o'clock that night and just after the plaintiff company's men had given a warning to our men that they were going to fire and our men had gone back in the drift out of the way. Our men had returned to work in the face of the drift and were loading a hole and preparing to fire it. I asked them if they had warned the men on the other side that they were going to shoot and they replied that they had and that they had received a response from them to "Let her go." They said "the Aspen men asked what kind of a hole have you got and we said we have a big hole and they said let her go." There was a period of perhaps ten minutes between the time of the warning as given by them until the firing of the shot. I received my instructions direct from Mr. Kirby on several occasions and about an hour previous to the firing of the last shot, not to allow any shots to be fired there without giving a sufficient warning to the Aspen men and giving them plenty of time to get out of the way. He told me to hold possession of the workings but not to injure any one or to use force or violence.

182

I have been mining at Rico for the past ten years and have been working on Newman hill for the past two years. I am familiar with the lodes and veins and the character of the same on Newman hill. I am acquainted with the location known as the "Jumbo No. 2." I know the lode and have frequently examined it, upon which it is claimed to be located. I have examined it in the breast of the Group tunnel and have also examined the lode upon which the Enterprise Company was working in the drift where the connection was made between that and the workings of the Rico-Aspen men as heretofore referred to in this affidavit. The appearance and character of the ore in this drift and that in the lode in the breast of the tunnel is the same and, in my opinion, they are parts of one

and the same vein and that if that drift were extended it would connect with the Group tunnel at the point where the lode was discovered. I have frequently been over the surface immediately above this lode and the vicinity thereof and the lode does not crop out on the surface and is unquestionably a blind lode. I am further convinced of this fact on account of there having been upraises (four in number) made from the drift which the Enterprise Company ran on this lode (being the same drift referred to herein in which a connection was made on September 1st, 1892, between it and the workings of the Rico-Aspen Company) and in each
183 case the vein gave out when the upraise reached the contact at distances from 16 to 33 feet.

LLOYD MORGAN.

[SEAL.] Subscribed and sworn to before me this 10th day of September, A. D. 1892.

WILLIAM B. HESS,
Notary Public.

My commission expires May 6th, 1894.

Indorsed: 2827. U. S. circuit court. The Rico-Aspen C. M. Co. *et al.*, plaintiffs, *vs.* The Enterprise M. Co., defendant. Affidavit 1 of Lloyd Morgan, for def't. Filed Sept. 20, 1892. Robert Bailey, clerk U. S. circuit court.

UNITED STATES OF AMERICA, *District of Colorado*, } ss:

Affidavit of Lloyd Morgan.

In the United States Circuit Court within and for the District of Colorado.

THE RICO-ASPEN CONSOLIDATED MINING COMPANY, a Corporation, *et al.*, Plaintiffs,
vs.
THE ENTERPRISE MINING COMPANY, a Corporation, Defendant.

STATE OF COLORADO, *County of Dolores*, } ss:

Lloyd Morgan being first duly sworn according to law, upon his oath deposes and says:

I am the same Lloyd Morgan who made an affidavit in the above-entitled cause at Rico, Colorado, on the 10th day of Sept., A. D. 1892. I am night foreman in the employ of the Enterprise Mining Company, of Rico, Colorado, and was such from the first to the 4th of September last, and had been for a long time prior thereto; that as such I had charge during said days in September from six o'clock in the evening until six o'clock in the morning of the workings of the said mining company upon what is known as the "Jumbo No. 2 mining claim," and all of the men employed

in said workings during said hours, it being my duty to direct and supervise the work done during said hours, in pursuance of the general directions and orders of Superintendent Kirby.

Between said hours on said days in September I had knowledge of all blasts or shots that were fired or fires that were built in
184 said workings; I have read the affidavit of Douglas L. V. Browne made in this cause. The statement therein that this defendant company "by its agents and employés ascended into the workings, levels, drifts and upraises, which had been in the possession of and which had been run within the lines of said 'Vestal' mining claim by the plaintiff company, and started and built fires in the stations, upraises and timbers in said workings, and exploded large amounts of giant powder and held possession of said premises from 12 o'clock on the night of September 1, 1892, until about the hour of 1 o'clock a. m., September 4, 1892, and that during that time the defendant company maliciously and recklessly burned and destroyed timber in the workings of the company aforesaid, and knocked down and broke down large quantities of rock and earth in said mine," is absolutely untrue; with reference to the time when I was on duty as night foreman on said days, to wit: between the hours of 6 o'clock p. m. and 6 o'clock a. m. of said days, that during said time when I was so on duty, no shots were fired nor blasts exploded, except in the workings made by the defendant company on said Jumbo No. 2 lode, and none were fired or exploded near any workings of the plaintiff company in said Vestal Lode mining claim, except those mentioned and described in my affidavit herein, dated September 10, 1892.

That no fires were during said hours when I was on duty, started or built in any stations, upraises or timbers in the workings of the plaintiff company in the said Vestal lode, and that no fire was built at all during the said hours when I was on duty as aforesaid, except in the drift run by the defendant company on the Jumbo No. 2 lode at the point where it connected with the winze sunk by the plaintiff company for the purpose, as I believed, of obstructing and hindering and stopping defendant company in the prosecution of further work upon said drift on said Jumbo No. 2 lode; during said hours when I was on duty no timbers of the plaintiff company were burned or destroyed, unless it be small pieces of lagging or broken timbers which fell into the drift of the defendant company through the aforesaid winze, constructed by the plaintiff company. The fire built on the night of September 1st in the drift of the defendant company on the said Jumbo No. 2 lode, was built solely for the purpose of defending the possession of said drift from a threatened attack of the employés of the plaintiff company; I and the other employés of the defendant company having charge of the work thereon, believing from the talk of the employés of the plaintiff company and from the character of the work which we were
185 informed was being done by them, that they intended to obstruct our workings and take possession of said Jumbo No. 2 lode and prevent us by means of fires and obstructions on the line of our drift from the further prosecution of work on said drift; that

on this same night, September 1st, volumes of smoke poured into the workings of the defendant company upon the Jumbo mine which were immediately connected with openings of our said drift on said Jumbo No. 2 lode driving the employés of the said defendant company from the various drifts of said workings and preventing them from prosecuting the work therein, and to such an extent in some instances as to endanger the lives of said workmen; that said smoke came into said workings from the "Montezuma" workings, which were connected with said Jumbo workings and which were then in possession and under the control of the plaintiff company; and this affiant is informed and believes that said smoke proceeded from and was caused by fires willfully and maliciously built by the employés under the directions and orders of said Douglas L. V. Browne for the purpose of driving the employés of the defendant company from the workings of the said Jumbo and Jumbo No. 2 lodes and preventing the prosecution of the work therein.

I have also read affidavit of Stephen R. Fitzgerald in this cause and say on oath that no fires were ever built or blasts exploded in the main level, or any other level, drift or upraise in the workings of the plaintiff company at the places stated by him or at any other place during the hours when I was on duty in said mine as aforesaid, and that I do not believe that such was the case at any other time; that I never heard of such being the case and never heard of any orders having been given to that effect.

LLOYD MORGAN.

[SEAL.] Subscribed and sworn to before me this 13th day of September, A. D. 1892.

WILLIAM B. HESS,
Notary Public.

My commission expires May 6th, 1894.

Indorsed: 2827. U. S. circuit court. The Rico-Aspen C. M. Co. *et al.*, plaintiffs, *vs.* The Enterprise M. Co., defendant. Affidavit 2 of Lloyd Morgan, for def't. Filed Sep. 20, 1892. Robert Bailey, clerk U. S. circuit court.

186 UNITED STATES OF AMERICA, } ss:
District of Colorado, }

Affidavit of Thomas Kane.

In the United States Circuit Court within and for the District of Colorado.

THE RICO-ASPEN CONSOLIDATED MINING COMPANY, a Corporation, *et al.*, Plaintiffs,
vs.
THE ENTERPRISE MINING COMPANY, a Corporation, Defendant.

STATE OF COLORADO, } ss:
County of Dolores, }

Thomas Kane, being first duly sworn according to law, upon his oath deposes and says:

I am the same Thomas Kane who made an affidavit in the above-entitled cause at Rico, Colorado, on the 10th day of September, A. D. 1892. I am day foreman in the employ of the Enterprise Mining Company, at Rico, Colorado, and was such from the 1st to the 4th of September last, inclusive, and had been for a long time prior thereto; that as such I had charge during said days in September from the time when Lloyd Morgan, the night foreman, went off duty in the morning until six o'clock in the evening, of the workings of the said mining company upon what is known as the Jumbo No. 2 mining claim, and all of the men employed in said workings during said hours, it being my duty to direct and supervise the work done during said hours in pursuance of the general directions and orders of Superintendent Kirby.

While I was on duty on said days in September I had knowledge of all blasts and shots that were fired or fires that were built or kept up in said workings. I have read the affidavit of Douglas L. V. Browne made in this cause. The statement therein that this defendant company—

"By its agents and employés ascended into the workings, levels, drifts and upraises, which had been in the possession of and which had been run within the lines of the said 'Vestal' mining claim by the plaintif- company, and started and built fires in the stations, upraises and timbers in said workings and exploded large amounts of giant powder and held possession of said premises from 12 o'clock on the night of September 1st, 1892, until about the hour of 1 o'clock a. m., September 4, 1892, and that during that time the defendant company maliciously and recklessly burned and
187 destroyed timber in the workings of the company aforesaid, and knocked down and broke down large quantities of rock and earth in said mine"—

is absolutely untrue in whole and in detail. With reference to the time when I was on duty as day foreman on said days as aforesaid, that during said days when I was on duty no shots were fired nor blasts exploded and none were fired or exploded at any other time during said four days to my knowledge, except in the workings made by the defendant company on said Jumbo No. 2 lode, and those were shots fired on the night of September 1, 1892, and referred to in my affidavit of September 10, 1892, and none were fired or exploded near any workings of the plaintiff company on said Vestal Lode mining claim to my knowledge except those mentioned in my said affidavit. That no fires were, during the said time when I was on duty, between said September 1st and September 4th inclusive, or at any other time, started, built or kept up in any stations, upraises or timbers in the workings of the plaintiff company in the said Vestal Lode claim, and that no fire was built at all or kept up at or during the said hours when I was *no* duty as aforesaid by the employés of the defendant company, except in the drift run by the defendant company on the Jumbo No. 2 lode at the point where it connected with the winze sunk by the plaintiff company for the purpose, I believe, of obstructing, hindering and stopping the prosecution of further work upon said Jumbo No. 2 lode, which

said fire was first built during the night of September 1, 1892; that during said hours when I was on duty during said days, or at any other time, no timbers of the plaintiff company were burned or destroyed, unless it be pieces of lagging or broken timbers which fell into the drift of the defendant company through the aforesaid winze, constructed by the plaintif- company. The fire built on the night of September 1st in the drift of the defendant company on the said Jumbo No. 2 lo le was built solely for the purpose of defending the possession of said drift from a threatened attack of the employés of the plaintiff company; I and the other employés of the defendant company having charge of the work thereon, believing from the talk of the employés of the plaintiff company and from the character of the work which we were informed was being done by them, that they intended to obstruct our workings and take possession of said Jumbo No. 2 lode and prevent us by means of obstructions on the line of our drift from the further prosecution of work on said drift, and we believed that the building of the fire was absolutely necessary to defend the possession of our drift from this threatened attack; that on the same night, September 1st, volumes of smoke poured into the workings of the defendant company upon the
188 Jumbo mine which said workings were immediately connected by openings of our said drift on said Jumbo No. 2 lode, driving the employés of said defendant company from the various drifts of said workings and prevented them from the prosecution of the work therein, and to such an extent in some instances as to endanger the lives of said workmen by suffocation, several of them who were in the stopes being rescued with difficulty; that said smoke came into said workings from the "Montezuma" workings which were connected with said Jumbo workings and which were then in the possession of and under the control of the plaintiff company; and this affiant is informed and believes that said smoke proceeded from and was caused by fires wilfully and maliciously built by the employés under the direction and orders of Douglas L. V. Browne for the purpose of driving the employés of the defendant company from the workings of the said Jumbo and Jumbo No. 2 lodes and preventing the prosecution of the work therein; and the affiant further says that said fires were continued and said smoke continued to pour in from the said Montezuma workings during all of the 2nd and 3d and part of the 4th days of September, 1892.

I have also read the affidavit of Stephen R. Fitzgerald in this cause, and say on oath that no fires were ever built or blasts exploded in the main level, or any other level, drift or upraise in the workings of the plaintiff company at the places stated by him, or at any other place during the hours when I was on duty in said mine as day foreman as aforesaid, and that I do not believe that such was the case at any other time; that I never heard of such being the case and never heard of any orders being given to that effect, and do not believe that such could have been the case at any time without my knowing it.

THOS. KANE.

[SEAL.] Subscribed and sworn to before me this 14th day of September, A. D. 1892.

WILLIAM B. HESS,
Notary Public.

My commission expires May 6th, 1894.

Indorsed: 2827. U. S. circuit court. The Rico-Aspen C. M. Co. *et al.*, plaintiffs, *vs.* The Enterprise M. Co., defendant. Affidavit 2 of Thomas Kane, for def't. Filed Sep. 20, 1892. Robert Bailey, clerk U. S. circuit court.

189 UNITED STATES OF AMERICA, } ss:
District of Colorado, }

Affidavit of Oliver P. Posey.

In the United States Circuit Court within and for the District of Colorado.

THE RICO-ASPEN CONSOLIDATED MINING COMPANY, a Corporation, *et al.*, Plaintiffs,
vs.
THE ENTERPRISE MINING COMPANY, a Corporation, Defendant.

STATE OF COLORADO, } ss:
County of Arapahoe, }

Oliver P. Posey being duly sworn says affiant resides at White Water, Wisconsin; that he is acquainted with David H. Moffatt and George Crawford; that he is familiar with the mining properties of the defendant company on Newman hill near Rico and is acquainted with the location of the Vestal Lode mining claim and its position relative to the mining claims and properties of the defendant company; that he had read the affidavit of David H. Moffatt filed in this suit and knows its contents; that affiant has been constantly in this State of Colorado since on or about July 22*th* last, and in the latter part of July and the month of August was present at several interviews between said Crawford and said Moffatt at the office of said Moffatt at the First National bank in Denver, and was present at the interview when said Crawford exhibited to said Moffatt a map showing the location of the various mining claims of the defendant company and also showing the location of the Vestal mining claim, stated in said Moffatt's affidavit to be the property of the complainant company, which map showed certain workings of the defendant company upon its various mining properties; that said interview at which said map was exhibited by said Crawford occurred on the 19th day of August, and there were also present at that time Eben Smith and one Roeder.

And affiant says that the statement in said affidavit of said Crawford at the time of the exhibition of said map assured said Moffatt and said Smith that the defendant company had not extended its workings across the boundaries of their property and had not en-

tered into or upon the premises of the Rico-Aspen Consolidated Mining Company, and that any or all insinuations of said Moffatt and said Smith are erroneous and misleading.

Affiant further says that said map was prepared by Mr.
190 Hunt the mining engineer, of Rico for surveys made by him prior to some day in the latter part of July, 1892, and affiant understood that said Hunt in an interview with said Hunt at Rico, on or about August 5th last at which time affiant, with the said Crawford made special inquiry of the said Hunt as to the position of the breast of the drift, which had been run by the defendant company from within its Jumbo Lode mining claim in and along the defendant company's Jumbo No. 2 lode or vein, which vein or lode is commonly known within said Jumbo Lode mining claim as the new Jumbo claim.

That said Hunt pointed out to affiant upon the map which he was then preparing for the use of the defendant company alone, and which is the same map that was exhibited to Mr. Moffat August 19th, the breast of said drift, and the same map executed at the time of his survey thereof, a few days prior to said August 5th interview, which breast of said tunnel was and is marked upon said Hunt's map as being R-2-E. G.

At said August 19th interview between Mr. Crawford and Mr. Moffat, Mr. Moffat stated he was informed that the Enterprise Mining Company had continued its workings from within its Jumbo mining claim to a distance of 146 feet over the line of and into said Vestal claim. Whereupon said Crawford stated to said Moffat that he must have been misinformed as to the extent of the workings of the defendant company; that when he, said Crawford, was at Rico, (which as affiany knows was on the 5th of August last), the workings of the Enterprise Company had only about reached the end line of the Vestal claim, and were not more than a few feet one way or the other, from said line.

That at such interview, and in connection with the statement by Moffat that the Enterprise Company had extended its workings 146 feet within the premises claimed by the complainant company, Mr. Crawford produced and exhibited the map which had been prepared by said Hunt, and forwarded by him to said Crawford, and pointed out to said Moffat the point R-2-E-G, as the point to which the Enterprise Company's workings had advanced at the time of the survey made by said Hunt a few days prior to said Crawford's August 5th visit to Rico. Said Crawford made no statement to the effect or indicative that the workings of the Enterprise Company along said Jumbo No. 2 vein had not been extended beyond the point marked 2 E. G. but his statements with reference to said point were solely and plainly limited to the point where the breast of the tunnel was at the time of the survey made by said Hunt a few days prior to August 5th, and so far as affiant recollects nothing was said by said Crawford at said
interview nor at any other interview at which affiant was
191 present between said Crawford and said Moffat tending to induce a belief upon the part of the said Moffat that the workings of the Enterprise Company would not be extended beyond the

line claimed as the boundaries of the Vestal mining claim; but affiant does recollect that at said August 19th interview said Crawford plainly stated to said Moffat that the Enterprise Mining Company through its Group tunnel had obtained mining rights wholly independent of the lines claimed as the boundaries of the Vestal mining claim and that said Enterprise Company had been advised by counsel whom he had consulted that its right to follow the Jumbo No. 2 vein through the workings therein was independent of the surface boundaries of the Vestal mining claim; and said Smith being present suggested that a survey should be made for the purpose of determining the extent of the Enterprise Company's workings, in which suggestion said Crawford acquiesced and an understanding was then had that a joint survey should be made of the workings of both companies extending toward or into the territory by either of the companies and that the said Crawford and said Smith should meet at Rico the following week and that such survey should then be made.

Affiant further says that he was present at several interviews between said Crawford and said Moffat prior to the visit of affiant and said Crawford to Rico on August fifth—and that at some one of those interviews said Crawford did state to said Moffat that he did not believe the workings of the defendant company had been extended across the lines of the Vestal claim; and that at one interview after affiant's return to Denver on or about August 8th said Crawford stated to Mr. Moffat that at the time said Crawford was at Rico the defendant company had not gone beyond the Vestal lines; but affiant further says that all the statements made by said Crawford at the interview subsequent to August 5th were all clearly made with reference to the condition of the workings at the time of Mr. Crawford's Aug. 5th visit to Rico and that no statement was made or intimation given by said Crawford at any of such interviews subsequent to Aug. 5th that the defendant company had not extended its workings since that time and no statement was made at any time that the defendant company would limit its workings upon said vein to territory outside of the lines claimed as the boundaries of the Vestal claim; that within a day or two subsequent to the August 19th interview affiant had a conversation with said Moffat alone, *of* which the subject of the workings of the Enterprise Company upon its Jumbo No. 2 vein was referred to and reference was also made to the map which had been exhibited by said Crawford, and affiant repeated to said Moffat the substance of the statement which had been made by the said Crawford to the
192 said Moffat and his associates on August 19th to the effect that the workings upon said Jumbo No. 2 vein as shown upon the map prepared by Mr. Hunt represented only the extent of the workings at the time such survey for said map had been made by Mr. Hunt; and affiant clearly remembers saying to said Moffat that he could not then say to what extent said workings had been extended since the survey made by the said Hunt.

That on Friday the 26th day of August affiant in response to a telegram from said Crawford went to Rico and there met Eben

Smith and informed him that said Crawford had been detained but would reach Rico that evening, and would be ready to unite in a joint survey as previously agreed; that said Smith thereupon informed affiant that his surveyor had been going over the surveys of the engineer of the complainant company and had been checking up the lines; and in response to affiant's statement said Smith stated that it was his full understanding that the Enterprise Company was to have the privilege of surveying any workings made on the premises claimed by the Rico-Aspen Consolidated Company, extending towards the property of the Enterprise Company and that said Rico-Aspen Consolidated Company was to have the same privilege with reference to the workings of the Enterprise Company extending towards the premises of the Rico-Aspen Consolidated Company.

That on the following day Crawford and affiant had an interview with said Smith in the morning, at which interview said Smith stated same understanding upon his part, and was informed by said Crawford that upon that understanding the joint survey should immediately begin, and affiant thereupon introduced said Smith's engineer to defendant company's engineer and instructed him to give to said Smith's engineer all information in his possession of the workings of the Enterprise Company and to proceed with the survey; that later in the evening of that day affiant learned that Mr. Boehmer, the engineer of the complainant company, after inspecting his maps and field-notes of said Hunt had informed him that no survey would be made until a connection had been made between the workings of the Enterprise Co. and of the Rico-Aspen Co.; that thereupon affiant and said Crawford being about to leave Rico went at once to the office of said Smith and inquired as to his reasons for not carrying out the agreement made at Denver, and repeated on the morning of that day and insisted that the joint surveys should proceed at once so that each party might learn the extent of the workings of the other. That said Smith did not at that interview state whether he would or would not permit
193 such joint survey to be made but promised to telegraph said Crawford at Durango the following day, at which time and place said Crawford received and exhibited to affiant a dispatch from said Smith, stating in substance that he would consent to the making of such joint survey.

Affiant further says that while at Rico on the 26th and 27th days of August he visited the workings of the Enterprise Company which were then being extended along said Jumbo No. 2 vein from the workings commenced within the Jumbo Lode mining claim, and was there informed by workmen of the defendant company that for several days they had heard the drilling and blasting in the workings of the Rico-Aspen Company being extended towards the workings of the Enterprise Company on such claim.

Affiant further says that for many years he has been extensively engaged in the development and operation of mines in Colorado and elsewhere, and has at times for considerable periods had charge of extensive mining operations. That he has upon several occasions visited and gone through many of the workings of the defend-

ant company in its properties at Rico, including its workings within the Jumbo mining claim, and believes that he has inspected at various times most of the workings of the defendant company within its premises in the vicinity of the Vestal mining claim. That he has carefully observed the Jumbo No. 2 vein where the same was discovered and cut in the Group tunnel, about 1,900 feet from entrance thereof, and has also examined the drifts and workings made upon said claim near said Group tunnel and which workings are shown upon the map prepared by Mr. Hunt as aforesaid, and affiant believes that such workings as shown upon said map are substantially correct except that said workings have been extended some distance further in a southwesterly direction since the making of the survey from which said map was prepared. That affiant has also examined the workings in and along said vein where the same has been opened and followed by the Enterprise Mining Company within the Jumbo Lode mining claim, which workings as affiant believes are correctly represented upon said map; and affiant also says that on the 27th day of August last he inspected the extension of said last-mentioned workings, as the same are extended along said vein into the premises claimed by the complainant company as a part of the Vestal Lode mining claim.

And affiant believes that all of the aforesaid workings are upon and are the same vein; and that if the said drift made by the Enterprise Company is extended northeasterly from the point
194 reached when the operations of said company were suspended in compliance with the requirements of the restraining order made in this case, upon the 9th instant, that such vein will be hereby established and proved to be the same vein cut and disclosed in the Group tunnel, and there located and claimed as the Jumbo No. 2 vein; that by the prosecution of the workings upon such veins from the Group tunnel and by the prosecution of the workings commencing within the Jumbo Lode mining claim, the connection thereof, in affiant's judgment, can be made within three months. Affiant further says that the number of tons of ore mined and removed by the Enterprise Mining Company along said vein within the premises in dispute included in this suit can now be readily and accurately estimated and ascertained and the value thereof can now be ascertained, and estimated, but affiant says that if the Rico-Aspen Consolidated Mining Company is permitted to stope, mine out and extract the ore in said vein, it will be impossible in a short time to ascertain or determine either the amount of ore removed by it from said vein, or the value thereof.

That affiant is familiar with the character and nature of the clay-shape stratum overlying the limestone stratum, commonly known as the "contact limestone," and which shale stratum overlies the apex of croppings of said vein. That said shale stratum is soft and broken in its character and when left unsupported by the removal of ore quickly settles down upon the limestone stratum so firmly that within a short time after the removal of ore above the "contact limestone," it is impossible to ascertain the amount of ore

removed and is generally impossible to determine that any working or opening therein has been made.

And affiant believes that if the complainant company is permitted to continue to work said vein and to remove said ore therefrom, it will in a short time be impossible to ascertain either the amount of ore taken and removed by the complainant company therefrom or the value thereof.

OLIVER P. POSEY.

Subscribed and sworn to before me this 17th day of September, 1892.

[SEAL.] WARREN D. WOODMAN.
Notary Public.

My commission expires July 17th, 1894.

193 Indorsed: No. 2827. U. S. circuit court. The Rico-Aspen Consolidated Mining Company, a corporation, *et al.*, plaintiffs, *vs.* The Enterprise Mining Company, a corporation, defendant. Affidavit of Oliver P. Posey, for def't. Filed Sep. 20, 1892. Robert Bailey, clerk U. S. circuit court. Charles H. Toll.

United States Circuit Court.

THE RICO-ASPEN CONSOLIDATED MINING COMPANY, a Corporation, *et al.*, Plaintiffs,
vs.
THE ENTERPRISE MINING COMPANY, a Corporation, Defendant.

STATE OF COLORADO, *County of Arapahoe,* } *ss:*

Charles Newman, being duly sworn, says that he resides at Durango, Colorado. That on the 25th day of July, 1887, affiant, Matthew T. Chestnut and William L. Stephens, all of whom were citizens of the United States, entered upon and took actual possession of the Group tunnel site, on Newman hill in Pioneer mining district, in the county of Dolores, State of Colorado. The said tunnel site was situated and located upon the unoccupied public domain of the United States. That affiant in his own behalf, and in behalf of his aforesaid colocators, Chestnut and Stephens, located and claimed the aforesaid Group tunnel site by placing a post firmly in the earth at the point of the commencement of the Group tunnel, and by placing and posting thereon in conspicuous manner, and so that the same might be readily observed, a good and sufficient notice required by law, giving the names of affiant and of the said Chestnut and Stephens as the locators of said tunnel site, the actual and proposed course and direction of said tunnel, and the height and width thereof, and the name thereof, to wit, "Group tunnel," date of the location of such tunnel site, namely, July 25th, '87. That on July 25th, 1887, the locators of said tunnel began the work of excavation of said tunnel, and thereafter diligently and

continuously prosecuted the excavation of the tunnel until about September 1st, 1891, at which time affiant and his colocators, Chestnut and Stephens, delivered possession of said tunnel to George Crawford, to whom affiant and his colocators had sold and conveyed said tunnel site and tunnel, with all their rights therein. That on or about July 26th, 1887, and contemporaneously with the commencement of the work of excavating, the locators of said Group tunnel caused the said tunnel site and the line thereof to be surveyed by a competent engineer, and duly and plainly
196 located the same on the surface of the ground, and marked and established the line of said tunnel site from the point of commencement where the said post and notice of location had been placed, which was the point of commencement of said tunnel, and extending thence in a straight line for a distance of 3,000 feet S. 57° E., and caused the said centre line of said tunnel site and location upon surface of the ground for said distance of 3,000 feet to be marked and established by posts along the line of said tunnel, said posts being placed at a distance as nearly 100 feet from each other as the character of the ground rendered practicable, and said posts being so marked as to show to any one observing the same that they were on and marked the centre line of said Group tunnel site and tunnel. That after the completion of such survey, and of the marking and establishing of the line of said tunnel site upon the ground, and on August 29th, 1887, affiant and his colocators filed for record in the office of the county clerk of said county a notice or certificate of location of the said Group tunnel site as required by law, and attached to said notice or certificate of location a copy of the notice of location which had been posted by the locators at the point of the commencement of said tunnel, and to which was also attached the sworn statements of affiant and his colocators, in which was set out among other things the name of said tunnel, date of the commencement of the actual work of excavation of said tunnel, date on which the same had been located, and their intention to prosecute the same for the purpose of prospecting for discovering and working all lodes, veins, ledges and deposits of minerals along the line of said tunnel and in which was also set out the amount expended in prosecution of said tunnel at that time. Affiant further says said notice and certificate of location, together with copy of the notice thereto attached in the said sworn statements, were on said 29th day of August, 1887, duly recorded in the office of said county clerk, and that a true copy thereof is hereto attached, marked "Exhibit A."

Affiant further says that from the time of the commencement of the excavation of said tunnel on the 26th day of July, 1887, the locators of said tunnel, until about August 1st, 1891, kept two or — men employed in the excavation of said tunnel, and affiant did not fail at any time for a period of six months to prosecute the work in said tunnel, and it is affiant's recollection that the actual prosecution of said work did not at any time cease for more than one week. That between said dates affiant and his said colocators had expended in the excavation of a tunnel immediately on the line of said

tunnel-site claim more than the sum of $17,000, and had driven and excavated such tunnel from said point of location upon and along the line of said tunnel site set out in said certificate
197 of location to a distance of more than 1,500 feet, which tunnel was excavated to a width of 4 (four) feet, and to the height of six (6) feet in the clear. That said tunnel site was located, and the line thereof marked and established, and notice of location posted, and the certificate of location recorded, and the said tunnel excavated in all respects in compliance with the mining laws of the United States, and the State of Colorado, for the purpose of discovering veins, lodes, ledges and mineral deposits, and to acquire and possess the right of possession of all veins, lodes, ledges or mineral deposits within 3,000 feet of the face of such tunnel on the line thereof, not previously known to exist, and which should be discovered in such tunnel to the same extent as if discovered from the surface.

That at the time of location, survey and record of said Group tunnel, and the commencement of the excavation thereof, and for more than two months thereafter, no vein, lode, ledge or mineral deposit had been discovered, or was known to exist on, or along the line of said Group tunnel, except a certain vein known and located as the Golden Age lode, which vein crossed the line of said Group tunnel, at a point not more than 350 feet from the face or portal of said tunnel. That in the month of July, 1879, affiant became interested in the location and ownership of certain mining claims upon said Newman hill, and which mining claims were situated a short distance from the line of said tunnel, and that from the month of July, 1879, until the date of the location of said Group tunnel, affiant had spent a considerable portion of each year upon said hill in connection with the management and operation of his said mining claims, and in prospecting and searching for veins, lodes and mineral deposits thereon and was at the time of the location of said Group tunnel, conversant and familiar with the prospecting work and development done upon said hill, and particularly with the work and development done within 1,500 feet on either side from the line of said tunnel. That affiant is acquainted with the location of the Vestal Lode mining claim, situated upon said hill, located by E. A. Armst, on or about April 2nd, 1888. That at the time of the location of such Vestal lode, the said Group tunnel was excavated and run to a distance of about 400 feet from the face of portal ther-. That affiant is informed that application for a patent — said Vestal Lode claim was filed on or about April 16, 1890, and that the receiver's receipt alleged in the amended bill of complaint herein, was issued on or about June 30, '90, and that the said Vestal mining claim was claimed and located on the southerly side and nearly parallel with said Group tunnel, and that its northerly side line was more than 500 feet south on the centre line of said
198 Group tunnel site. That on the 16th day of April, 1890, the breast of said Group tunnel was more than 850 feet distant from the northwest corner of said Vestal claim, which said northwest corner of the said Vestal claim was the point of said claim

nearest the breast of said Group tunnel. That on the 30th day of June, 1890, the breast of said Group tunnel was at least 750 feet distant from the northwest corner of said Vestal claim, and no portion of the said Vestal claim was located upon or across the centre line of the said Group tunnel site.

And affiant further says that prior to the issuance of a receiver's receipt for the said Vestal claim, no vein, lode, ledge or mineral deposit had been cut or discovered in the said Group tunnel extending into, toward, or in the direction of said Vestal claim.

Affiant on June 30th, '90, and for some time previous thereto, was familiar with the course and direction of the veins or lodes theretofore discovered in the vicinity of said Group tunnel, and the line thereof, and for a long distance on either side thereof, and was familiar and well acquainted with the nature and character of the veins or lodes existing in said Newman hill, so far as the same had been discovered and developed theretofore, and that affiant between April 16th, 1890, and June 30th, 1890, fully believed that if any veins extending in, to, or toward the said Vestal claim should be cut or disclosed in the further extension and prosecution of said Group tunnel that such vein or lode would, by reason of the relative location of said tunnel, and of said Vestal claim, and of the course and character of the vein or lode system in said Newman hill, necessarily cross the side lines of said Vestal claim, and be "cross-veins" to and within said Vestal claim.

Affiant further says that from the time of the location of said tunnel site up to the time of the sale thereof to said Crawford, it was at all times the intention and purpose of affiant and his said co-owners thereof to prosecute and run said tunnel to a point 3,000 feet from the portal thereof, for the discovery of veins and lodes containing precious metals and to obtain and enjoy the possession of all such veins and lodes crossing said tunnel as were not known to exist prior to the location of said tunnel.

——— ———.

Subscribed and sworn to before me this 14th day of September, 1892.

[SEAL.] WILLIAM R. BARBOUR,
Notary Public.

My commission expires Oct. 19, 1892.

199 EXHIBIT A.

Tunnel Claim—Location Certificate.

STATE OF COLORADO, } ss:
County of Dolores, }

Know all men by these presents that the undersigned citizens of the United States this 17th day of August, A. D. 1887, claim by right of location a tunnel claim known as the Group tunnel site for the purpose of discovering and working veins, lodes or deposits on the line thereof. Said tunnel claim is situated in the Pioneer min-

ing district, county of Dolores, State of Colorado, and the location and bounds of said tunnel are staked on the surface at the place of commencement and described as follows: Va. 13° 50′ E. beginning at portal or face of tunnel whence the N. W. cor. sec. 36 T. 40 N. R. 11 W. of the N. M. P. M. bears N. 29° 30′ 57″ W. 4,024.0 ft., Elliott Mt. bears N. 27° 25′ W., Anchor Pk. bears N. 78° 13′ W. thence S. 57° E. 75.4 ft. an aspen post marked Group tunnel site and 89.1 ft. so marked because it is 89.1 ft. from point X which is a point 13.7 ft. N. 57° W. from face 295.3 ft. an aspen post marked as before and 309.0 ft. 510.9 ft. an aspen post marked as before and 524.6 ft., 625.2 ft. an aspen post marked as before and 638.9 ft. whence cor. 4 sur. 434, bears S. 36° 51′ W. 131.4 ft. Storm Pk. bears S. 79° 30′ W., Elliott Pk. bears N. 28° 30′ W. 714.3 ft. an aspen post marked as before also 728.0 ft. whence cor. 4, sur. 436 A, bears S. 33° 23′ E. 300 ft. 1,124.9 ft. and aspen post marked as before and 1,138.6 ft. 1,203.7 ft. a spruce post marked as before and 1,217.4 ft. 1,480.1 ft. a spruce post marked as before and 1,493.8 ft. 1,698.8 ft. an aspen post marked as before and 1,712.5 ft. 1,917.7 ft. a spruce post marked as before and 1,931.4 ft. 2,656.2 ft. a spruce post marked as before and 2,669.7 ft. whence a spruce tree 29″ dia. bears N. 57° W. 13.0 ft. 3,000 ft. a spruce post marked end of Group tunnel, whence Elliott Pk. bears N. 31° 12′ W. Anchor Pk. bears N. 72 W. a spruce tree 17″ dia. bears S. 26° 40′ W. 18.9 ft. Situated on west slopes of Dolores Mt. about ¼ mi. S. E. of Rico.

Copy of Notice of Location.

Group tunnel site.

Know all men by these presents that the undersigned hereby locate and claim this tunnel site beginning at this point and running S. 57° E. for a distance of 3,000 ft. and the right of possession of 1,500 ft. in length and 300 ft. in width of all veins, lodes, ledges or mineral deposits along the line thereof that shall be discovered or intersected by this tunnel or any cross-cut therefrom. Size of tunnel 4 ft. by 6½ ft. high.

CHARLES NEWMAN.
W. L. STEPHENS.
MATTHEW T. CHESTNUT.

Dated this 25th day of July, A. D. 1887.

STATE OF COLORADO, } ss:
County of Dolores, }

Charles Newman being duly sworn on his oath deposes and says that he is a citizen of the United States and that he is one of the locators and owners of the Group tunnel site mentioned in the above and foregoing certificate of location thereof, that work was commenced on said tunnel on the 26th day of July, A. D. 1887, and cover entered the 3rd day of August, 1887, that said date of commencement was ever since has been and is now his *bona fide* inten-

tion to prosecute work on said tunnel for the purpose of as expressed in foregoing certificate of prospecting for discovering and working all lodes, veins or deposits of mineral along the line of said tunnel. Affiants further say, that in the prosecution of work on the said tunnel site since the commencement thereof they have expended more than $125.00.

CHARLES NEWMAN.

[NOTARIAL SEAL.] Subscribed and sworn to before me this 24th day of Aug., A. D. 1887.

CHARLES D. WRIGHT,
Notary Public.

Also M. T. Chestnut and Wm. M. Stephens, Charles Newman, att'y-in-fact and agent for said M. T. Chestnut and Wm. L. Stephens as co-owners in the within-mentioned "Group" tunnel site. Chas. Newman. Witness: F. R. Lewis.

STATE OF CALIFORNIA, } ss:
City and County of San Francisco, }

Wm. L. Stephens being duly sworn on his oath deposes and says that he is a citizen of the United States and that he is one of the locators and owners of the Group tunnel site mentioned in the above and foregoing certificate of location thereof, that work was commenced on said tunnel on the 26th day of July, A. D. 1887, and cover entered the 3d day of August, A. D. 1887, that said date of commencement was ever since has been and is now his *bona fide* intention to prosecute work on said tunnel for the purpose of, as expressed in foregoing certificate of prospecting for discovering
201 and working all lodes, veins or deposits of mineral along the line of said tunnel. Affiants further say, that in the prosecution of work on said tunnel site since the commencement thereof they have expended more than $125.00.

WM. L. STEPHENS.

[SEAL OF COURT.] Subscribed and sworn to before me this 31st day of August, A. D. 1887.

WM. REDDICK,
County Clerk and ex Officio Clerk of the Superior Court.

STATE OF MISSOURI, } ss:
City of St. Louis, }

Matthew T. Chestnut, being duly sworn on his oath deposes and says that he is a citizen of the United States and that he is one of the locaters and owners of the Group tunnel site mentioned in the above and foregoing certificate of location thereof, that work was commenced on said tunnel on the 26th day of July, A. D. 1887, and cover entered the 3d day of August, A. D. 1887, that said date of commencement was ever since has been and is now his *bona fide* intention to prosecute work on said tunnel for the purpose of, as

expressed in foregoing certificate of prospecting for discovering and working all lodes, veins or deposits of mineral along the line of said tunnel. Affiants further says that in the prosecution of work on the said tunnel site since the commencement thereof they have expended more than $125.00.

MATTHEW T. CHESTNUT.

[SEAL.] Subscribed and sworn to before me this 31st day of August, A. D. 1887.

JULIUS ROBERTSON,
A Commissioner for the State of Colorado at St. Louis, Mo.

Indorsed: No. 2827. U. S. circuit court. The Rico-Aspen Consolidated Mining Company, a corporation, *et al.*, plaintiffs, *vs.* The Enterprise Mining Company, a corporation, defendant. Affidavit of Charles Newman for def't. Filed Sep. 20, 1892. Robert Bailey, clerk U. S. circuit court. Charles H. Toll.

202 UNITED STATES OF AMERICA, } ss:
District of Colorado, }

Affidavit of Edward N. Van Cortlandt.

In the United States Circuit Court within and for the District of Colorado.

THE RICO-ASPEN CONSOLIDATED MINING COMPANY, a Corporation, *et al.*, Plaintiffs,
vs.
THE ENTERPRISE MINING COMPANY, a Corporation, Defendant.

STATE OF COLORADO, } ss:
County of Arapahoe, }

Edward N. Van Cortlandt, being duly sworn, says: I reside in the city and State of New York. I am a mining engineer. I have followed the profession of a mining engineer for the last seven years. In the pursuit of my profession I have spent about three years in the Western States and Territories of the United States, and about four years in South America and Central America. I am acquainted with John B. Farish, and have examined and am familiar with the map or tracing referred to in the affidavit of said Farish and marked "John B. Farish, Exhibit A."

Prior to the 11th inst., I have had no professional or other connection with the defendant company. On that day at the request of said Farish, I visited the mining premises of the defendant company near Rico, Colorado, and examined some of the workings thereof on the 11th and 12th days of the present month, and made a careful and particular examination of the Group tunnel of the defendant company, and of the vein crossed by said tunnel near the breast thereof, and at a distance of about 1,920 feet from the mouth of said tunnel. Beginning on the southerly side of said

tunnel, and about 30 feet from the point where the Jumbo No. 2 vein was cut in said tunnel, a cross-cut marked in blue on said map and run for a distance of about 50 feet to a point where such cross-cut intersected said vein, and from the point of intersection a drift had been extended along said vein in a southwesterly direction for a distance of about 100 feet, such drift extending in a southwesterly direction for some distance further than is shown upon said map.

I also visited the workings marked "Eureka cross-cut" on said map, which cross-cut intersected the same vein but at a point about 94 feet above the level of said tunnel and first-mentioned drift;
203 from the point of intersection of said Eureka cross-cut with the said vein, a drift had been run in a northeasterly direction in and along said vein for a distance of 220 feet, and a drift had also been run in a southwesterly direction in and along said vein for a distance of 121 feet, and a winze, 94 feet in vertical height, had been raised, connecting the first-mentioned drift with the drift run from the Eureka cross-cut, the connection of said two drifts having been made at the point marked "R-J No. 2" on said map.

Affiant also inspected the workings which he was informed were made by the defendant company in and along a vein called the Jumbo No. 2, or new vein, which workings beginning within the Jumbo Lode mining claim at the point marked "R-2-J" on said map, extended in a northeasterly direction to and beyond the point marked "R-2-E-J" on the said map; such workings and drift at the time of my visit had been extended to a distance of about 90 feet in a northeasterly direction from said point marked "R-2-E-J." I was informed that from a point near the face of such drift an upraise had been made by the complainant company for a distance of about 20 feet, and that other workings in said vein had been made by the complainant company for some distance further along said vein to the northeast, but I was prevented from entering into such workings and drift by the guards and employés of the complainant company.

I also visited and carefully inspected the workings of the defendant company indicated upon said map by blue lines, and from the point marked "R-2-E-J" within the Jumbo Lode mining claim, and extending in a southwesterly direction and having therein the upraise marked "R-4 J," which workings are upon and within the same vein as the drifts marked "R-1-E-J" and "R-2-E-J."

I also carefully examined the defendant'c cross-cut from the Jumbo shaft to the point marked "R-2-J," and which cross-cut upon said map is marked "Jumbo cross-cut south." I did not find that said Jumbo cross-cut intersected or crossed any workable vein between the Eureka vein and the Jumbo No. 2 or new vein.

I also carefully examined the Group tunnel between the point where it intersects the Eureka vein and the point where it intersects the Jumbo No. 2 vein, and I did not find any workable vein crossing or intersecting said tunnel between said two veins, nor did I find any workable vein intersecting the Eureka cross-cut between the Eureka vein and the Jumbo No. 2 vein. The vein cut by said Group tunnel at a point about 1,920 feet from the mouth thereof,

and there called the Jumbo No. 2 vein, is a fault-fissure vein,
204 having its apex in the stratum of broken shale rock resting upon a stratum of limestone, and the apex of such vein, as shown by the workings therein in, about and near said Group tunnel, is, in my judgment, 300 or 400 feet below the surface of the earth. The vein upon which the aforesaid drift commencing within the Jumbo Lode mining claim, and extending thence northeasterly into the premises claimed as the Vestal mining claim, is also a fault-fissure vein, and such vein by upraises therein at the points marked "R-2 J," "R-1-E-J" and "R-2-E-J," is shown to be a blind vein, having its apex in the said stratum of broken shale rock.

I closely examined the structure of the vein and the character of the ore exposed in the aforesaid drift and workings, and am of the opinion that all of said workings are upon one and the same vein, and that said workings if extended following the ore will meet. I examined the Eureka, the Enterprise and the Hiawatha veins, which veins have been cut by said Group tunnel and developed upon the premises of the defendant company by numerous drifts and workings thereon, for a great distance, and which veins extended in a direction generally parallel with said Jumbo No. 2 vein, and I examined the geological formation within which such veins are contained. The Jumbo No. 2 vein, as shown by the aforesaid workings therein, near the Group tunnel, and by the workings therein from within and extending northeasterly from the Jumbo Lode mining claim, belongs to the same system of veins as the above-named Eureka, Enterprise and Hiawatha veins, but said Jumbo No. 2 vein essentially differs from said Eureka, Enterprise and Hiawatha veins by the extent of the vertical faulting of the enclosing formation. The degree of vertical faulting of the Jumbo No. 2 vein, I found a characteristic and distinguishing feature of the vein, and is much greater than in either of the other veins, and I found that the vertical faulting in the workings upon the Jumbo No. 2 vein near the Group tunnel corresponded closely with the vertical faulting in the workings within the Jumbo Lode mining claim and extended northeasterly therefrom, and in my judgment such corresponding degree of vertical faulting clearly identifies the vein as being one and the same vein.

EDWARD N. VAN CORTLANDT.

Subscribed and sworn to before me this 20th day of September, 1892.

[SEAL.] WARREN D. WOODMAN,
Notary Public.

My commission expires July 17", 1894.

205 Indorsed: No. 2827. U. S. circuit court. The Rico-Aspen Consolidated Mining Company, a corporation, *et al.*, plaintiffs, *vs.* The Enterprise Mining Company, a corporation, defendant. Affidavit of Van Cortlandt, for def't. Filed Sep. 20, 1892. Robert Bailey, clerk. Charles H. Toll.

UNITED STATES OF AMERICA, } ss:
District of Colorado, }

Affidavit of John B. Farish.

In the United States Circuit Court within and for the District of Colorado.

THE RICO-ASPEN CONSOLIDATED MINING COMPANY, a Corporation, *et al.*, Plaintiffs,
vs.
THE ENTERPRISE MINING COMPANY, a Corporation, Defendant.

STATE OF COLORADO, } ss:
County of Arapahoe, }

John B. Farish, being duly sworn, says that he resides in the city of Denver, that he is by profession a mining engineer, and for more than 18 years, has been engaged in the examination and working in & operation of gold and silver mines in the State of Colorado, and other western States and Territories. That during the months of February and March, 1891, affiant made an extended examination of the mines and mining claims situated on Newman hill, Dolores county, Colorado; that such inspection and examination was made at the request of George Crawford and intending purchasers of numerous properties upon Newman hill, that such inspection occupied about forty days, and in connection therewith affiant made a close and careful examination of the geological formation of said Newman hill, and of the veins and ore deposits therein, and then inspected and examined nearly all the workings, drifts, tunnels, winzes and shafts theretofore made within the Enterprise, Eureka, Hiawatha, Kitchen, Montezuma, Song Bird, Headley, Old Discovery and Jumbo Lode mining claims, and the Group tunnel, and numerous veins discovered and located in said Group tunnel. That affiant likewise also spent nearly the entire month of June, 1891, in a continued and further examination of said mining claims, and the workings and developments therein, and in and upon other mining claims upon said Newman hill, and in the immediate vicinity of the above-mentioned mining claims, and in the supervision and direction of the development of the above-mentioned and other lode mining claims.

206 That nearly the entire month of August 1891 was also spent by affiant in similar examination, and in directing the work then being carried on in said mining premises and premises immediately adjacent thereto. That in the month of December last, affiant spent ten days in the examination of some of the aforesaid mining claims and others lying contiguous thereto. That affiant has in the aggregate spent not less than one hundred days in the examination of the veins and ore deposits on Newman hill, and that the greater portion of such time was spent by the affiant in the examination of the veins and ores in the aforesaid lode mining claims

and Group tunnel, and of the vein systems in the immediate vicinity of the western and Vestal mining claim of the plaintiff company. That the affiant's last visit to said mining claims was made on the 11th and 12th days of the present month, when he made a careful inspection of said Group tunnel and vein last discovered or cut therein, and located therein as the "Jumbo No. 2" vein, and also made a careful examination and inspection of the drifts and other workings of the Enterprise Mining Company, within its Jumbo Lode mining claim, and upon and along the vein designated and known within said Jumbo Lode mining claim as the Jumbo new vein, and of the continuation and extension of the drifts and workings of said company, upon such vein to the point where such workings connect, with the workings made by the Rico-Aspen Consolidated Mining Company, and which point of connection if about one hundred fifteen (115) feet northeasterly from the easterly side line of said Jumbo Lode mining claim. That the drifts, tunnels and other workings made within the aforesaid and other mining claims of said Enterprise Mining Company lying in the immediate vicinity of said Vestal Lode claim, and which affiant examined during his various visits to said properties exceeds in affiant's judgment, three miles in aggregate length and that the nature and the character and the geological formation on Newman hill within the area of such workings and including the workings immediately adjacent to the westerly end of said Vestal mining claim has through and by means of such workings upon the properties of said Enterprise Mining Company been so developed and disclosed that any one experienced in the observation of the structure and character of veins and lodes can with reasonable certainty distinguish or identify the veins therein disclosed. That from the examinations made as aforesaid by affiant, he is enabled to say that the vein called the "Jumbo No. 2" vein and mentioned in the certificate of location of the Jumbo No. 2 Lode claim filed for record in the office of the county clerk of Dolores county, on the 31st day of August, 1892, and which vein was disclosed and cut in the Group tun-
207 nel at a distance of about nineteen hundred (1,900) feet from the mouth thereof, is the same vein also disclosed in the workings of the Enterprise Mining Company within its Jumbo Lode mining claim, and there known and called the Jumbo new vein, and upon and along which vein the workings of said Enterprise Mining Company have been extended from within its Jumbo Lode mining claim to the point where such workings connect with the workings of said Rico-Aspen Consolidated Mining Company.

Affiant further says that no veins or lode have been disclosed in the workings of the Enterprise Mining Company upon its mining premises in the vicinity of the westerly end of said Vestal mining claim which extended above or have their apices or croppings above a certain contact plane, which is bounded on the lower side by a stratum of limestone, known among the miners as the contact limestone, and on the upper side by a certain stratum of broken or com-inuted gray clay shale, which contact plane in the immediate vicinity of the westerly end of said Vestal Lode claim is found at a

depth approximately from 200 to 300 feet below the surface of the earth, and affiant further says that all the veins or lodes heretofore discovered and mined within the workings upon the mining premises — the defendant company in the vicinity of the aforesaid Vestal Lode mining claim are blind lodes, and that the apices or croppings thereof do not at any time come to the surface of the earth, but only to the aforesaid contact plane.

Affiant further says that the vein discovered and location in the Group tunnel at a distance of about nineteen hundred (1,900) feet from the portal thereof, and there located and claimed as the Jumbo No. 2 vein, possesses and has the same general characteristics at said point of discovery and location in the Group tunnel as in the workings extending from within the Jumbo Lode mining claim to the hereinbefore-mentioned point of connection between said workings and the workings made by the plaintiff company within the boundaries of the Vestal Lode mining claim, and that the vein cut and disclosed as aforesaid in the Group tunnel is, in affiant's judgment, the same vein disclosed in said workings extending from within the Jumbo Lode mining claim.

Affiant further says that the said vein belongs to the system of veins commonly known among the miners in that vicinity as the "vertical pay veins," several of which veins have been disclosed in the prosecution of said Group tunnel, and which veins extend in a generally parallel direction and have a strike or course varying from a few degrees to as many as forty-five degrees east and north. That the said Jumbo No. 2 vein near the point where it was cut by the Group tunnel has been developed by a cross-cut from
208 said Group tunnel, which cross-cut intersects the said vein at a point about fifty feet south of the line of said tunnel, and from such point of intersection has been extended in and along said vein for a distance of about one hundred feet, in a southwesterly course. That said Jumbo No. 2 vein has also been intersected by a cross-cut drift known as the Eureka cross-cut at a point about one hundred and fifteen feet (115 feet) south from the line of said Group tunnel, and that from such point of intersection a drift has been extended in and along said vein for a distance of about 121 feet, in a southwesterly direction, and for a distance of about 220 feet in a northeasterly direction. That said last-mentioned drift along said Jumbo No. 2 vein is about ninety-four (94) feet above the line of the hereinbefore-mentioned cross-cut drift, run from said Group tunnel and that said two drifts are connected by a winze marked "R-J-No. 2" upon a plat which affiant has had prepared for presentation in connection with this affidavit and which plat is marked, "John B. Farish, Exhibit A." That said Jumbo No. 2 vein where the same is found within the Jumbo Lode mining claim has been developed by drifts and numerous raises, aggregating not less than six hundred (600) feet within the boundaries of the said Jumbo claim, and a drift has been extended for a distance of about one hundred & fifteen (115) feet in a northeasterly direction from and beyond the easterly line of said Jumbo mining claim, and that the vein in which said drifts and workings have been made within said

Jumbo Lode mining claim and extended northeasterly therefrom, is in and by all said drifts and workings shown to be the same vein discovered and located as aforesaid in the Group tunnel. That said vein in and by all the workings made therein, whether at or near the said Group tunnel or within or northeasterly from said Jumbo Lode mining claim, is shown to be faulted much more than the other veins belonging to said vertical pay vein system; that all of the veins belonging to said vertical pay vein system are of a class known as "fault fissure" veins, and that the faulting along the line of the Jumbo No. 2 vein or Jumbo new vein is greater in extent than along the line of the other veins belonging to this system; and affiant further says that the extent of the faulting along the course of the Jumbo No 2 vein furnishes an easy and reliable means of identifying the said vein in the various workings on such vein; and affiant further says that said vein, where the same exists within the Jumbo Lode mining claim, was first discovered therein by means of a cross-cut known as the Jumbo cross-cut south, and which cross-cut is shown on the aforesaid map, and extends from the Jumbo shaft to the point marked "R-J-2" "breast, September 1st, '91," which point is the point of intersection of said cross-cut with said Jumbo No.
209 2 vein. That said vein was discovered and cut at said last-mentioned point about the 20th day of August, 1891, while affiant was at Rico, and engaged in the examination of the hereinbefore-mentioned mining claims, and that after careful examination of the said vein at said point of discovery and carefully observing the course and characteristics thereof, and having learned from such examination that the vein discovered at that point was a new vein, and different from any theretofore discovered in the Group tunnel, or of any other workings in said Newman hill, affiant was of the belief that such vein would in its course cross the line of said Group tunnel at a point within and beyond the point to which said Group tunnel had then been extended, and affiant thereupon urged the said Crawford that said Group tunnel should be extended as fast as possible in order that said vein might be cut and disclosed by said Group tunnel as soon as possible; and affiant further says that after his hereinbefore-mentioned inspection of said mining premises in the month of December, 1891, and after his examination of such drifts and workings as had then been made in said vein within said Jumbo Lode mining claim, he again urged the said Crawford to cause the said Group tunnel to be rapidly prosecuted in order that said vein might be reached by means of said tunnel, and by a sketch which the affiant then prepared indicated the approximate point on the line of said tunnel, at which, in affiant's judgment, said vein would be cut by said tunnel, and affiant says that as nearly as he can recollect the point designated by him as the point at which in his judgment said vein would be intersected by said Group tunnel was within about one hundred thirty (130) feet of the point where said vein was so intersected by said tunnel; and affiant further says that no intermediate vein was cut in extending said tunnel from the point to which the same had been prosecuted in December, 1891,

until said Jumbo No. 2 vein was cut and disclosed therein, and affiant further says that the said Jumbo No. — vein is the first workable vein belonging to said vertical pay vein system which was discovered in the prosecution of said Group tunnel beyond the point of discovery of the Eureka vein therein, the course of which Eureka vein is shown on said map, and which course of said Eureka vein is established by continuous workings thereon, from said Group tunnel to and beyond the hereinbefore-mentioned Jumbo cross cut, and affiant also says that the said Jumbo No. 2 vein, where the same was cut and disclosed by means of said Eureka cross-cut at the point marked "R-J-2" within said Jumbo Lode mining claim, is
210 the first workable vein of said vertical pay vein system encountered in said Eureka cross-cut beyond said Eureka vein.

Affiant further says that the ore found at the top or apex of the said Jumbo No. 2 vein, and in the plane of the contact between the aforesaid limestone stratum, and the overlying shale stratum, is of higher grade than the ore at other and lower portions of the vein, and that the value of the ore at the apex and above said limestone stratum cannot be even approximately determined by the actual value of the ore in such vein below said limestone stratum; that the shale stratum lying above the limestone and above the apex of such vein is a broken clay shale, which rapidly settles when the ore is removed from the aforesaid contact plane between said shale stratum and said contact limestone stratum thus closing all openings from which ore may have been extracted, and leaving such workings in such condition as to appear as though no ore had been taken from said plane. And affiant says that from his observation of the workings of said Jumbo No. 2 vein, and from his observation and experience in the workings adjacent to the westerly end of the Vestal claim, he believes that if the plaintiff company is allowed to extract ore from the Jumbo No. 2 vein within the contact plane that the openings made in the extraction or mining of such ore at the apex of said vein will within a very short time after the removal of such ore become completely filled and closed by the settling of the aforesaid shale stratum, leaving such workings in appearance as if no ore had been extracted or removed; and affiant further says that it would in a very short time after the extraction and removal of ore in such vein at such contact plane be impossible to even approximately ascertain the amount of ore removed from said vein above the aforesaid contact limestone stratum. And affiant further says that if the timbers necessarily used in working such vein at such contact plane should be removed the overlying shale stratum will, in affiant's judgment within thirty days generally settle so closely upon said contact limestone stratum that it would be extremely difficult and almost impossible to discover the course and extent of such workings or to estimate even approximately the amount of ore extracted. That affiant's judgment and statement in this respect is founded upon his observation of numerous and extensive workings along said contact plane in premises adjacent to said Vestal mining claim where said overlying shale stratum has

settled and completely filled the workings made in the removal of ore along said contact plane.

JOHN B. FARISH.

Subscribed and sworn to before me this 16th day of [SEAL.] September, 1892.

WILLIAM R. BARBOUR,
Notary Public.

My commission expires Oct. 19, 1892.

(Here follows map marked p. 211.)

212 & 213 Indorsed: No. 2827. U. S. circuit court. The Rico-Aspen Consolidated Mining Company, a corporation, *et al.*, plaintiffs, *vs.* The Enterprise Mining Company, a corporation, defendant. Affidavit of John B. Farish for def't. Filed Sep. 20, 1892. Robert Bailey, clerk U. S. circuit court. Charles H. Toll.

UNITED STATES OF AMERICA, } ss:
District of Colorado, }

Affidavit of Daniel Kirby.

In the United States Circuit Court within and for the District of Colorado.

THE RICO-ASPEN CONSOLIDATED MINING COMPANY, a Corporation, *et al.*, Plaintiffs,
vs.
THE ENTERPRISE MINING COMPANY, a Corporation, Defendant.

STATE OF COLORADO, } ss:
County of Dolores, }

Daniel Kirbey, of lawful age, being first duly sworn according to law, upon his oath, deposes and says:

I am thirty-eight years of age. I am a miner by profession, and have been engaged in that business continuously since early boyhood. I have resided in Colorado about fourteen years and during all that time have been engaged in gold and silver lode mining. I reside in Rico, Colorado, and have resided there for about fifteen months last past, and during all that time have been and am now superintendent of the mining properties of the defendant company situated on Newman hill in the immediate vicinity of the town of Rico. As such I have had and now have superintending charge of all of the workings of the said mining properties. In the performance of my duties as such superintendent I have investigated and am familiar with the geological formation of said Newman hill, and with the character of the veins and lodes therein bearing the precious metals.

Some time in August, 1891, while running the cross-cut from the Jumbo shaft within the Jumbo Lode mining claim a vein about

eight or ten inches in width bearing gold and silver in paying quantity was encountered at a point which on the map marked "John B. Farish, Exhibit A," and referred to in the affidavit of John B. Farish in this suit, is marked "Breast," September 1st, '91, R-J-2. The point where said vein was cut and discovered in said cross-cut, which cross-cut is commonly known as the Eureka
214 cross-cut, was at a depth of about 500 feet from the surface of the earth; that by means of drifts and raises in said vein, it was found and proved to be a blind vein, the apex thereof being in the broken-shale strata lying immediately above the limestone stratum commonly known as the "contact limestone," and the apex of said vein was found to be at a depth of about 280 feet from the surface of the earth. Under the direction of affiant drifts were extended along said vein in a northeasterly as well as a southwesterly direction from the original point of intersection and the course of such vein was thereby so far established that affiant was convinced that the said vein would be cut and disclosed on the line of the Group tunnel. It was affiant's belief that the drifts and raises made in said vein within the Jumbo Lode mining claim also established the fact that such vein was distinct from any other vein theretofore discovered or cut in any of the workings in the properties of the defendant company, and it appeared from the development of said Jumbo cross-cut, and from the other workings of the defendant company, that the vein intersected by said Jumbo cross-cut was the first workable vein of the vertical pay-vein system existing beyond or easterly of the Eureka vein, the course and location of which Eureka vein is also shown on said map, and affiant was convinced that the said newly discovered vein would be the first vein encountered in the extension of said Group tunnel beyond the Eureka vein. That the Group tunnel was thereupon prosecuted rapidly with the purpose of cutting such vein as quickly as possible.

And affiant further says that in driving said Group tunnel a vein was cut therein at a point about 1,920 feet from the face of portal of said tunnel, which vein possessed the same characteristics as the vein cut and disclosed as aforesaid in the Eureka cross-cut, and known as the Jumbo No. 2 or new vein; that thereupon the said vein where discovered and cut in the Group tunnel was claimed and located as the Jumbo No. 2 vein, and a certificate of location thereof was thereafter and on the 31st day of August, 1892, duly filed and recorded in the office of the county clerk of Dolores county, Colorada, a copy of which certificate of location is hereto attached, marked "Exhibit A." That the vein so encountered in the Group tunnel was the first vein encountered beyond the Eureka vein. That such vein has been developed in the immediate vicinity of said tunnel by workings shown on said map near the point marked "Discovery Jumbo No. 2 vein," and one of said workings consists of a cross-cut run from Group tunnel until such cross-cut also intersected said vein, from which point a drift has been run to a distance of about 50 feet south of the point marked R-J-No. 2, such drift being
215 about 100 feet in and along said vein; said vein near said tunnel has also been developed by a drift therein from the

point where the Eureka cross-cut intersects said vein, and such drift has now been extended to a distance of at least 275 feet in and along said vein; said last-mentioned drift is 94 feet, vertical height, above the floor of said tunnel, and the two drifts have been connected by a raise at the points marked R-J-No. 2 and R-J-No. 2, which raise is within the vein, and shows the same to be distinct and continuous between the two levels.

Affiant says that from his knowledge of said workings, and of the workings upon the vein within the Jumbo Lode mining claim, and from his familiarity with the workings and characteristics of other veins in said Newman hill, and in the properties of the defendant company, he is able to say, that the vein which was intersected in the Jumbo Lode claim in August, 1891, and thence followed northeasterly to the point of connection of said workings with the workings of the complainant company, is the same vein cut in said Group tunnel as aforesaid. And affiant says that if the said workings are extended toward each other in and along the vein, they will connect, and will establish the fact that said workings are all upon the same vein; that such connection can be made within about three months, and certainly within four months.

And affiant further says that both said levels on said Jumbo No. 2 vein near the Group tunnel are now being extended as rapidly as possible along said vein to the southwest, and that the upper drift has now reached a point about 250 feet south of said tunnel.

And affiant further says that the workings along said vein from within the Jumbo Lode claim were not extended by the defendant company beyond the easterly side line of said Jumbo claim until after said vein had been discovered and located in the Group tunnel as the the Jumbo No. 2 lode as aforesaid, but that since the location of the Jumbo No. 2 Lode claim such workings within the Jumbo Lode claim have been extended along the vein to the northeast until such workings, on or about September 1st, intersected the workings of the Rico-Aspen Company on the same vein at a point about 87 feet in a northeasterly direction from and beyond the west end line of the Vestal mining claim.

Affiant further says that on the 3rd day of this month, being notified by telegram from the attorneys of the defendant company that a restraining order had been made by the honorable judge of this court, affiant caused all work upon said vein to be suspended, except in the workings near the Jumbo tunnel.

216 Some time prior to August 20th, last, I realized from hearing the sounds of their work that the Rico-Aspen men were driving their workings in the Vestal claim toward our workings, and from private information learned that they proposed to head us off and prevent our further prosecution of work on the lode in the drift run by us northeasterly from the Jumbo claim, and to take possession of said drift, and from his experience as a miner affiant knows that the workmen of the Rico-Aspen Company for some days prior to August 20th, last, knew and could from the drilling and blasting of the defendant company's employés in said vein, determine the point upon said vein where the defendant company's

employés were working. Upon learning of the intention of the complainant company's employés, I instructed our foreman and our men to prosecute the work on the drift continuously, and to hold possession of it, but to be careful and do no personal injury to any one, and on several occasions in the three or four days preceding the actual connection of said workings, I repeatedly told both our foreman and men that before firing any shots they must give ample warning to the Rico-Aspen men, so that there could be no possibility of their being injured. On the afternoon of September 1st, last, at about one or two o'clock, I went into the above-mentioned drift, and found that the Rico-Aspen men had broken a small hole through into our drift, through which the air came, and I could hear them when talking in an ordinary tone. I found that they had notified our men to stop work in our drift and that they had stopped. I told our men to go on with the work. In the evening our night foreman, Lloyd Morgan informed me that the Rico-Aspen people were endeavoring to break into our workings through what is known as the "Montezuma" workings, so I went up to that point and caused bulkheads to be put in to protect that part of our property. I then returned to the aforementioned drift on the Jumbo No. 2 lode running northward, and found that our men had, as I had ordered, drilled four holes and were about to fire. I told the men to be careful and to notify the Rico-Aspen workmen before firing to get out and stay out, that they were going to fire, and to give them ample time to get a place of safety.

I was standing near the drift and heard W. J. Grandstaff tell the Rico-Aspen men to go out and stay out, that we were about to fire four holes. After a number of minutes the shots were fired, and three of them went off. James Dockery, one of our men, ran forward and called to the Rico-Aspen men on the other side to keep out—not to come down. I told our men that in case it was necessary to protect our workings from capture, but not otherwise to build a fire in the drift. I then and at all times cautioned them to be very careful, and not to injure any of the Rico-Aspen men,
217 nor any of the property of said company, my only desire and intention being at all times to drive forward the drift on the lode on which we were then and had been for some time working.

After the three shots were fired, I remained in the drift a short time, and then went home and went to bed. I was awakened at about 4.30 o'clock in the morning, and upon going to the mine found that the Rico-Aspen people were "smoking our men out" by means of smoke from the "Montezuma" workings owned and operated by the plaintiff company, connected with our workings, and thereby had already driven our men back sixty or seventy feet. I endeavored to protect our workings so far as possible by bulkheading and closing all connections, but they continued "smoking us" all day Friday (September 2nd), and all of Friday night, and all of Saturday until evening.

Affiant further says that he has no means of ascertaining what injury, if any, was done to the workings of the complainant com-

pany from any blast fired by defendant company, but affiant knows that no injury whatever to any of defendant company's workings was done by any of the blasts fired by the defendant company, that all blasts fired by the defendant company were fired from within its own workings, and if any injury had been thereby caused, such injury would necessarily and inevitably have resulted to the workings of defendant company instead of to the workings of the complainant company.

DAN'L KIRBY.

[SEAL.] Subscribed and sworn to before me this 17th day of September, A. D. 1892.

WILLIAM R. BARBOUR,
Notary Public.

My commission expires Oct. 19, 1892.

(Copy.)

EXHIBIT A.

STATE OF COLORADO, } ss:
County of Dolores, }

Know all men by these presents, that the Enterprise Mining Company, the undersigned, has this fifteenth day of June, 1892, located and claimed, and by the presents does locate and claim, the right of discovery and location, in compliance of the mining acts of Congress approved May 10th, 1872, and all subsequent acts, and with local customs, laws and regulations, 1,500 linear feet and
218 horizontal measurement on the Jumbo No. 2 lode, vein, ledge, or deposit, along the vein thereof, with all its dips, angles and variations, as allowed by law, together with 150 feet on the end W. side, and 150 feet on the S. E. side of the middle of said vein at the surface, so far as can be determined from present developments; and all veins, lodes, ledges or deposits and surface ground within the lines of said claim 54 feet running N. 54° 30′ E. from center of discovery point and 1,446 feet running S. 54° 30′ W. from centre of discovery point; said discovery point being situate upon said lode, vein, ledge or deposit, and within the line of said claim in the Group tunnel at a point 1,920 feet from the entrance thereof in Pioneer mining district, county of Dolores and State of Colorado, described by metes and bounds as follows, to wit:

Beginning at corner No. 1 a post and mound of stone- whence an aspen 10 ins. dia. bears S. 40° E. 3.5 feet. Expectation Mt. bears N. 67° 30′ W. Storm peak bears S. 85° 15′ W. and cor. No. 3 of sur. No. 780 Telegraph lode bears S. 16° 36′ W. 99.9 ft. Thence var. 13° 30′ E. N. 54° 30′ E. 770 ft. to N. W. side center stake, 1,500 ft. to cor. # 2 a post and mound of stones which is also cor. No. 3 of sur. 6285 Eureka lode; thence S. 35° 30′ E. 300 ft. to cor. # 3, a post and mound of stones. Thence S. 54° 30′ W. 730 ft. to S. E. side center stake, 1,500 ft. to cor. # 4 a post and mound of stones, whence an aspen stump 14 ins. dia. bears N. 16° E. 25 ft. Thence

N. 35° 30′ W. 300 ft. to cor. # 1 the place of beginning, containing 10,331 acres of surface ground. The location stake is placed on the surface at a point vertically over a duplicate location stake and notice placed in the Group tunnel at the point of discovery of the vein.

ENTERPRISE MINING COMPANY. [SEAL.]

Said lode was discovered on the 15th day of June, A. D. 1892.
Attest: E. W. HUNT, *Surveyor.*

Date of location survey, July 14th, A. D. 1892.
Date of certificate, August 31st, A. D. 1892.

STATE OF COLORADO, } ss:
County of Dolores, }

I, F. R. Lewis, county clerk and recorder, in and for said county in the State aforesaid, do hereby certify the above and foregoing to be a full, true and correct copy of the location certificate of the Jumbo No. 2 Lode mining claim as appears upon the records of my office.

[SEAL.] Given under my hand and official seal this 3d day of September, A. D. 1892.

F. R. LEWIS,
County Clerk and Recorder,
By A. H. MUNDEE, *Deputy.*

219 Indorsed: No. 2827. U. S. circuit court. The Rico-Aspen Consolidated Mining Company, a corporation, *et al.*, plaintiffs, *vs.* The Enterprise Mining Company, a corporation, defendant. Affidavit of Daniel Kirby, for def't. Filed Sep. 20, 1892. Robert Bailey, clerk U. S. circuit court. Charles H. Toll, sol'r for def't.

UNITED STATES OF AMERICA, } ss:
District of Colorado, }

Affidavit of Ellery W. Hunt.

In the United States Circuit Court within and for the District of Colorado.

THE RICO-ASPEN CONSOLIDATED MINING COMPANY, a Corporation, *et al.*, Plaintiffs,
vs.
THE ENTERPRISE MINING COMPANY, a Corporation, Defendant.

STATE OF COLORADO, } ss:
County of Arapahoe, }

Ellery W. Hunt, of lawful age, being first duly sworn, deposes and says on oath: I reside at Rico, Colorado, and have resided there for nearly four years last past; I am a civil and mining engineer by profession and have been engaged in the practice of that profes-

sion continuously for the past ten years, all of it in the State of Colorado and since February, 1889, continuously in Pioneer mining district, Dolores county, Colorado, in which district and county the town of Rico is situated; that I am acquainted with the Jumbo mining claim and the Jumbo No. 2 mining claim belonging to the defendant company and the Vestal mining claim, the Aspen mining claim, and the Old Discovery mining claim belonging to the plaintiff company, and also with the Group tunnel location owned by the defendant company, all situate in said mining district.

During the time mentioned I have been resident engineer and surveyor for both the plaintiff and the defendant companies and their grantors and as such, during that time, have made both surface and underground surveys of the properties above mentioned at frequent intervals: that the map accompanying this affidavit, marked "E. W. Hunt, Exhibit A," showing the above-mentioned mining claims and the various underground working- thereon was made by me from my surveys, the last of which were completed on Saturday, September 17th, 1892; that on said map the under-
220 ground workings on the Vestal and Aspen mining claims are shown in green colors, those on the contact of all the workings are shown in red colors, and the level of the Group tunnel in blue colors.

That the main level from the Vestal shaft runs in a northwesterly direction 376 feet from said shaft, terminating in a winze marked "B;" that on the 12th and 13th of September, 1892, I made surveys in and through said Vestal mining lower level; that I carefully examined the same; that I discovered no evidence of a vein therein nor of any mineral-bearing ores, until I reached the place marked on said map as raise marked "2," a distance of about 215 feet from *from* the shaft, at which point a small quartz vein about three inches in width, the quartz being of white and pink color, crossed the level and upon which there was an upraise and a drift 41 feet in length, not being paying ore so far as I could determine from its appearances and from my general knowledge of the ores in this country; that after crossing this vein, I discovered no other evidence of a vein or vein matter in this level until we reached the point marked "raise 3," from which point to that point marked "winze B," the level was run in a vein and being the same vein upon which the defendant company had run its level to said point marked "winze B."

That from the point indicated on the map as raise 3, I found that the plaintiff company had made an upraise on the vein to and through the contact, the distance from floor of the level to the roof of the contact drift being 44.6 feet and that they had drifted on said contact for a distance of 21 feet northeasterly and 21½ southwesterly from the centre of said raise. I found that the plaintiff company had drifted on the level a distance of 45 feet northeasterly and were still working there at the time of my survey.

At the point marked on the map as "1,920-foot point" in the Group tunnel, meaning a distance of 1,920 feet from the face of the tunnel, I found a lode and vein about 10 inches in width bear-

ing mineral in paying quantities, the trend of course of said vein being about north 39° east. I found that the defendant company had explored this vein by means of a drift marked on the map to a point 150 feet distant from the tunnel.

In addition to the work which I have done in my professional capacity on the mountain where these claims are located, I have also engaged in mining myself and am familiar with the character of the lodes and veins on said mountain and of the ore found therein and of the geological formation of the hill in which said veins are found. Based upon my knowledge of and familiarity with
221 these veins and lodes and from the examination which I have at divers times made of the lode in question, I am clearly of the opinion that the lodes disclosed in the defendant's workings on the level run from the Jumbo to the point marked "winze B," and that in the Group tunnel at the 1,920-foot point and that in the drift run from said tunnel by the defendant company, are one and the same lode and that if the levels so started by the defendant company were continued on this lode they would connect; that the distance between the said level of defendants at the point marked "winze B" and the level run by them from the Group tunnel is about 525 feet and from my knowledge of the formation through which the connecting drift would be run, it would require, in my opinion, about three months to make the connection by a drift on the lode.

And deponent further says: I have examined the map marked "John B. Farish, Exhibit A," accompanying the affidavit of said Farish in this case; that said map so far as it shows the Jumbo No. 2, the Headley and other mining locations, and the workings thereon, is a tracing of that portion of a map made by me from surveys on said claims, which said surveys were completed by me on the 31st day of July, 1892, which map was completed by me and forwarded to Mr. Crawford, the secretary of the defendant company, on the 7th day of August last, which map is, I am informed, the same map which was exhibited by said Crawford to Mr. D. H. Moffat on the 19th day of August, 1892. I have examined the level extending from the point marked "R-2-E-J" upon the said Farish Exhibit A map into the said Vestal mining claim. I visited such workings on the 29th day of August last, and at that time the amount of the ore extracted by the defendant company in driving said level could have been very accurately ascertained by measurement of the drift of the vein therein, of the floor, roof and breast of said level and the value of the ore removed therefrom by the defendant could have been ascertained with very great accuracy by samples and assays of the ore from the vein in the roof, floor and breast of such level.

That on Saturday last, the 17th inst., when I again visited said workings, the employés of the complainant company were engaged in breaking down and stoping ore from the roof of the level run by the defendant company and were thereby rendering it more difficult to ascertain the amount and value of the ore removed by the defendant company from such level; that on the 17th inst. the

miners whom I was informed were in the employ of the complainant company, were also engaged in breaking down and removing ore from the said vein near the apex or top thereof, immediately above the limestone stratum commonly known as the "contact limestone" and were extending drifts in both directions from
222 the point marked "raise 3" on the map marked "E. W. Hunt, Exhibit A."

Deponent further says: In making my surveys and examination of the underground workings on the plaintiffs' mining claims on Saturday, September 17th last, I found that two stopes on the contact in the Aspen mining claim had been extended across the end line extended vertically downward of the said Aspen mining claim, into the territory claimed by the defendant company, its said Jumbo mining claim, both of which stopes appear to have been run on ore, both showing ore in the breast on that day, and both being represented on the map accompanying this affidavit marked "E. W. Hunt, Exhibit A," one of said stopes being extended across said end line and into the territory of the defendant company a distance of twelve feet and being thirteen feet in width, and the other a distance of about seven feet in length and eight feet in width.

I also found that a stope had been extended across the north side line of the said Aspen mining claim into the territory claimed by defendant company a distance of about 23 feet in length and 5 feet in width, this stope also appearing to have been run on ore, and I have been informed and believe that all three of said stopes were run by the plaintiff company.

Deponent further says: At the time of the survey of the plaintiffs' underground workings, made by me on Saturday, September 17th, 1892, I found that the main level of the Aspen mining claim had been extended until it intersected the vein upon which the defendant company had run a level from the Jumbo claim and which vein was claimed by defendant as the Jumbo No. 2 at a point marked on the map accompanying this affidavit as "raise 2," and that at such point the workmen of plaintiffs were making an upraise.

I further found at the time of my survey on said day, that the plaintiff had erected a windlass at the top of the winze marked on the accompanying map as "winze B," and that they were breaking down ore in the level of defendant company left by it at the time of the issuance of the restraining order by the honorable judge of this court and were hoisting it through said winze.

ELLERY W. HUNT.

[SEAL.] Subscribed and sworn to before me this 20th day of September, A. D. 1892.

WARREN D. WOODMAN,
Notary Public.

(Here follows map marked p. 223.)

224 & 225 My commission expires July 17, 1894.

Indorsed: No. 2827. U. S. circuit court. The Rico-Aspen Consolidated Mining Company, a corporation, *et al.*, plaintiffs, *vs.* The Enterprise Mining Company, a corporation, defendant. Affidavit of Ellery W. Hunt for def't. Filed Sept. 20, 1892. Robert Bailey, clerk. Charles H. Toll.

UNITED STATES OF AMERICA, } ss:
District of Colorado, }

Affidavit of George Crawford.

In the United States Circuit Court within and for the District of Colorado.

THE RICO-ASPEN CONSOLIDATED MINING COMPANY, a Corporation, *et al.*, Plaintiffs,
vs.
THE ENTERPRISE MINING COMPANY, a Corporation, Defendant.

STATE OF COLORADO, } ss:
County of Arapahoe, }

George Crawford, being duly sworn, says that he is the secretary and treasurer of the defendant company, and resides in the State of New York, but during the last two months has been in the State of Colorado the greater portion of the time. That he has read the affidavits of David H. Moffat and Eben Smith in behalf of the plaintiffs herein. That on or about the 22nd day of July, last, affiant had an interview with said Moffat in Denver, in which said Moffat stated that complainant company would like to arrange for a survey of the underground lines, and arrange for the drainage of its water through the defendant company's tunnel. On the following day and pursuant to arrangement, affiant met said Moffat, Eben Smith, and one, Brown, superintendent and manager of said complainant company, and Mr. O. P. Posey was also present. At that interview it was stated by the said Moffat, or said Smith, that they wished to arrange for a joint survey of the ground, and that they were informed that the affiant's company had extended its workings more than one hundred feet into the ground of the Vestal mining claim and also intimated that they were informed that affiant's company had extended its workings from its Jumbo Lode mining claim over and into the premises claimed by the complainant company as the Old Discovery mining claim; in response to which statement affiant assured said Moffat and said Smith that he
226 was certain that the workings of defendant company had not been extended beyond the side lines of said Jumbo claim and at that interview an arrangement was made and an appointment was made to meet said Smith at Rico, on the second week thereafter. On the 5th day of August, affiant was at Rico, and there saw Mr. Hunt, the engineer of the defendant company, who was then engaged in completing a map for the defendant company, showing its mine workings from surveys made by the said Hunt,

shortly prior to that day, and as affiant understood the said Hunt had surveyed the defendant company's workings extending from its Jumbo mining claim toward the mining claims claimed by the complainant company, only a few days prior to August 5th, and, as affiant believes, on or about the last day of July, and affiant understood from said Hunt that at the time of the survey such workings had not been extended within the premises claimed by the complainant company as the Vestal mining claim; and affiant also learned from the superintendent of the defendant company that the workings had not then been extended more than four or five feet beyond the point reached at the time of said Hunt's survey. That after affiant's return to Denver, he had a further interview on the 19th day of August, with Mr. Moffat, at which time there were present Mr. Posey, Mr. Smith, & Mr. Roeder and at that time it was stated by said Moffat and Smith that they had learned that the defendant company had extended its workings into the premises claimed as the Vestal mining claim for a distance of 146 feet; that thereupon this affiant exhibited the map upon which said Hunt was engaged at the time of affiant's visit to Rico, August 5th, and affiant thereon pointed out to said Moffat the point to which defendant company's workings had been extended at the time of the survey made by Mr. Hunt for the purpose of preparing said map, and affiant stated to said Moffat that when he was at Rico on August 5th the workings of the Enterprise Company had only about reached the lines of the Vestal claim, and was not more than a few feet one way or the other from said line, and that the point to which the workings had been advanced at the time of said Hunt's survey was the point marked on said map R-2-E-J, and that it was not possible that the workings of the Enterprise Company could have been extended over into the premises claimed by the Rico-Aspen Company any such distance as was stated by the said Moffat; but affiant did state to said Moffat and to said Smith that the Enterprise Company had through its Group tunnel and its discoveries therein, mining rights which were wholly independent of the lines claimed as the boundaries of the Vestal mining claim, and that the defendant company had been informed by attorneys whom affiant had consulted that it had the right to follow the Jumbo No. 2 claim without reference to the surface boundaries of the
227 Vestal mining claim, and affiant says that neither at said interview nor at any interview prior thereto or thereafter, did affiant state to said Moffat and Smith, that the Enterprise Company would not extend its workings along said vein, nor did affiant at any time after August 5th, make any statement as to the extent of such workings, except with reference to the extent of such workings at the time of affiant's visit to Rico, August 5th; and affiant says that his statement in that respect was made clearly and that he verily believes that at the August 19th interview said Moffat and said Smith clearly understood the affiant's statements were made with reference to the condition and extent of the workings of the Enterprise Company at the time of the survey thereof by said Hunt, a few days prior to August 5th, and at the time of affiant's visit to Rico, Au-

gust 5th, and affiant says that at that interview he stated to said Moffat that he could not then tell how far the workings had been advanced in the meantime beyond the point marked R-2-E-J.

At the 19th August interview it was agreed that a survey of the underground workings of each company should be made, and that Mr. Smith and affiant should meet at Rico on Wednesday of the following week for the purpose of making such survey. Affiant being detained in Denver, did not reach Rico until the evening of Friday, August 26th, and on the morning of Saturday the 27th, had an interview with Mr. Smith and was informed by said Smith that his engineer had been checking up the lines, and it was then arranged that the survey should immediately proceed, and Mr. Hunt, the engineer of the Enterprise Company, was instructed to exhibit his maps and field-notes to the said Smith's engineer, Mr. Bohmer, and affiant supposed until late in the evening of that day that the engineers had entered upon and were making such joint survey, when he learned that said Bohmer, after examining the maps and field-notes of defendant's engineer had informed him that the joint survey would not be entered upon or made until the workings of the two companies should be connected with each other. That thereupon affiant immediately called upon said Smith and insisted that the joint survey should be made and inquired his reasons for not carrying out the agreement for a joint survey and was informed by said Smith that his engineer could not then remain at Rico, but that upon affiant's demanding that said survey should be made and the agreement with reference thereto carried out, said Smith agreed to telegraph to affiant on the following day at Durango whether or not he would consent to the making of such survey, and on the following day affiant received at Durango a dispatch from said
228 Smith expressing his willingness to proceed with such survey, and such survey did proceed upon the following day, as affiant is informed, so far that the said Boehmer and all his assistants entered into the workings of the defendant company and were permitted to inspect and survey and did inspect and survey all workings of the defendant company which they desired to survey. That thereupon, as affiant is informed and believes, and immediately upon completion of the survey of the defendant's premises by said Boehmer, said Hunt and Daniel Kirby, superintendent of the defendant company, with one other assistant, went to the workings of the complainant company upon the Vestal Lode mining claim, for the purpose of surveying the workings of said complainant company extending toward or into the premises of the defendant, but said Hunt was refused permission to have the said Kirby assist him in the making of any survey within the premises claimed by the complainant company, although affiant had theretofore stated to said Smith, the general manager of said complainant company, that in making the survey of the workings of the complainant company affiant desired said Kirby to assist in the survey, to which request the said Smith had assented.

Affiant further says that while he was at Rico, on the 27th day of August, he visited the workings of the Enterprise Company, which

were then being extended along said Jumbo No. 2 vein from the workings commencing within the Jumbo Lode mining claim, and was then informed by the workmen of the defendant company that the workings of the complainant company had been extended so near to the workings of the Enterprise Company that for several days the workmen had heard the drilling and blasting in the workings of the Rico-Aspen Company, and affiant says that on the same day he was informed by said Smith that the employés of both companies were signalling to each other and had signals by which they notified and warned each other when they were about to fire blasts, so that no injury might be done to the employés of either company.

Affiant further says that he has been extensively engaged in the development and operation of mines in Colorado and elsewhere. That he has upon several occasions visited and gone through many of the workings of the defendant company in its properties at Rico, including its workings within the Jumbo mining claim, and believes that he has inspected at various times most of the workings of the defendant company within its premises in the vicinity of the Vestal mining claim.

That he has carefully observed the Jumbo No. 2 vein where the same was discovered and cut in the Group tunnel about 1,900
229 feet from the entrance thereof, and has also examined the drifts and workings made upon said claim near Group tunnel, and which workings are shown upon the map prepared by Mr. Hunt as aforesaid, and affiant believes that such workings as shown upon said map are substantially correct, except that said workings have been extended some distance further in a southwesterly direction since the making of the survey from which said map was prepared. That affiant has also examined the workings in and along said vein where the same has been opened and followed by the Enterprise Mining Company within the Jumbo Lode mining claim, which workings, as affiant believes are correctly represented upon said map; and affiant also says that upon the 27th day of August last he inspected the extension of said last-mentioned workings, as the same are extended along said vein into the premises claimed by the complainant company as a part of the Vestal Lode mining claim.

And affiant believes that all of the aforesaid workings are upon and in the same vein; and that if the said drift made by the Enterprise Company is extended northeasterly from the point reached when the operations of said company were suspended in compliance with the requirements of the restraining order made in this case upon the 3th inst., that such vein will be thereby established and proved to be the same vein cut and disclosed in the Group tunnel, and there located and claimed as the Jumbo No. 2 vein; that by the prosecution of the workings upon such vein from the Group tunnel and by the prosecution of the workings commencing within the Jumbo Lode mining claim, the connection thereof, in affiant's judgment, can be made within three months.

Affiant further says that the number of tons of ore mined and removed by the Enterprise Mining Company along said vein,

within the premises in dispute included in this suit, can now be readily and accurately estimated and ascertained and the value thereof can now be ascertained and estimated, but affiant says that if the Rico-Aspen Consolidated Mining Company is permitted to stope, mine out and extract the ore in said vein, it will be impossible in a short time to ascertain or determine either the amount of ore removed by it from said vein, or the value thereof.

That affiant is familiar with the character and nature of the clay shale stratum overlying the limestone stratum, commonly known as the "contact limestone," and which shale stratum overlies the apex or croppings of said vein. That said shale stratum is soft and broken in its character, and when left unsupported by the
230 removal of ore quickly settles down upon the limestone stratum so firmly that within a short time after the removal of ore above the "contact limestone," it is impossible to ascertain the amount of ore removed and is generally impossible to determine that any working or opening therein has been made.

And affiant believes that if the complainant company is permitted to continue to work said vein and to remove said ore therefrom, it will in a short time be impossible to ascertain either the amount of ore taken and removed by th complainant company therefrom or the value thereof.

GEORGE CRAWFORD.

Subscribed and sworn to before me this 20th day of [SEAL.] September, 1892.

WARREN D. WOODMAN,
Notary Public.

My commission expires June 17th, 1894.

Indorsed: No. 2827. U. S. circuit court. The Rico-Aspen Consolidated Mining Company, a corporation, *et al.*, plaintiffs, *vs.* The Enterprise Mining Company, a corporation, defendant. Affidavit of George Crawford for def't. Filed Sept. 20, 1892. Robert Bailey, clerk. Charles H. Toll.

UNITED STATES OF AMERICA, } *ss.*:
District of Colorado, }

Affidavit of Daniel Kirby.

In the Circuit Court.

THE RICO-ASPEN CONSOLIDATED MINING COMPANY *et al.*, Plaintiffs, *vs.* THE ENTERPRISE MINING COMPANY, Defendant. } No. 2827.

Daniel Kirby, being first duly sworn, upon his oath says: I am the superintendent of the defendant company. On the afternoon of September 22nd, last, I received a dispatch of which the following is a copy:

"DENVER, *September 22nd*, 1892.

Daniel Kirby, superintendent, Rico, Colo.:

Judge Hallett has directed issuance of order restraining Rico-Aspen Consolidated Mining Company from or mining the vein in dispute and also including the top or contact of the vein. Ascertain who is in charge of their workings and show him this dispatch.

ADAIR WILSON.
CHARKES H. TOLL."

231 I handed the dispatch to Lee S. Woods, the superintendent of the complainant company at 7.00 o'clock in the evening of that day, and after the said Woods had read the same, I asked him if he understood it and he replied that he did and that the work would be stopped; but later in the evening he sent me word that he must hear from headquarters before doing anything, meaning that he would have to receive instructions from his superior officers. On the following morning I learned from credible persons that immediately after I had given the said dispatch to the said Woods, the force of miners employed by the Rico-Aspen Company was doubled and that from that time until four o'clock in the morning of the 25th of September, a double force was employed by the Rico-Aspen Company in mining ore from the vein mentioned in the order made by the judge of this court on September 22nd, restraining the Rico-Aspen Company from working or mining in said vein. I am informed that Douglas L. V. Browne was in Denver at the time said order was made, September 22nd, and I know that he was in Rico one or more days before the mining and removal of ore from said vein within the "Vestal" mining claim and in the premises mentioned in said order ceased. Immediately after the removal of ore from said vein was discontinued, two or three of the employés of the Rico-Aspen Company began digging a ditch from the winze mentioned in the affidavits heretofore filed in this cause, and continued such digging until the ditch was completed from said winze to the line of the Vestal claim and toward the premises and workings of the Enterprise Company the obvious purpose of the excavation of such ditch being that the Rico-Aspen Company might turn into the workings of the Enterprise Company, whenever desired, a large amount of water being continuously produced in the workings of the Rico-Aspen Company, and which, if the pump of the said Rico-Aspen Company in its Vestal workings should at any time stop, would run through said ditch into the Enterprise Company's workings and cause great injury.

A guard was caused to be kept by the Rico-Aspen Company on said drift at the Vestal line, as claimed by the Rico-Aspen Company, and neither myself nor Thomas Kane, the inspectors appointed by the order of this court of September 22nd, were permitted to enter said drift until September 26th, when the guard was withdrawn and we were permitted to enter said drift. We found that the drift extended by the Enterprise Company for a distance of

about eighty feet beyond the disputed line had been completely filled with broken rock and earth, so that when the order was made on the third inst., permitting the Enterprise Company to extend said drift, four days were consumed in removing such rock and
232 earth, before any extension of said drift could be made. On the morning of the 4th inst. I visited said drift and found two guards, who were employés of the Rico-Aspen Company, stationed there, and was informed that they had been stationed there by the direction of the said Browne.

On the 4th inst. I received a dispatch, of which the following is a copy:

"DENVER, COLO., *October 3rd*, 1892.

Daniel Kirby, Rico, Colorado:

Order permitting extension in lower drifts in Vestal and Contention. Keep ore separate, show Wood this telegram and begin work.

CHARLES H. TOLL."

As I was unable to find Mr. Wood, I showed the dispatch to the said Browne about six o'clock in the evening of the 4th inst., and I was informed by him that he would not recognize the telegram and would fight us until he received papers from the court confirming it. Immediately afterwards, I received a certified copy of the order of the 3rd October, permitting the extension of said drift, and having found said Browne, about eight o'clock the same evening, I showed the said certified copy of the said order to him and left it with him. At that time said Browne stated that he would be at the mine the next morning and see what they would do. He met me at the mine at ten o'clock and turned over the papers to me and said I could go ahead but that he wanted to come through the workings on both sides of the vein, to which I replied that he could not enter any of the workings, except as provided in the order of the court, but that Words and Way could visit both levels and see the work go on and see us handle the ore, but not enter through the tunnel but they could come through their own workings by way of the Vestal as that was my orders.

When Kane and I, the inspectors appointed by the order of September 22d, obtained admission to said workings, we found that the drift along the top of the vein had been extended to a point about ten feet from the easterly line of the Vestal claim and that all the ore in said drift had been taken away. From my experience in running drifts in similar ground, it is my belief that such drift must have been extended at least — feet, after I had notified said Wood of said order, and I believe that ore to the value of five thousand dollars was broken down and removed by the employés of the Rico-Aspen Company, after such notice.

233 On or about September 4th, I was notified by John Kincaid that the order had been granted restraining the Enterprise Company from continuing its drift within the Vestal premises claimed by the complainant, and immediately discontinued such drift, although no copy of the order of September 3rd was served

upon me until some time thereafter. At the time that said Kinkaid gave me such notice, he informed me that it was my duty to discontinue any work without further notice. At the time that I received notice from said Kinkaid, he was in Rico, and was a considerable portion of each day in company with said Browne and said Wood.

DAN'L KIRBY.

Subscribed and sworn to before me this 23rd day of
[SEAL.] October, A. D. 1892.

BEN. H. PELTON,
Notary Public.

My commission expires June 8th, 1896.

Indorsed: 1. A. No. 2827. In the circuit court. The Rico-Aspen Consolidated Mining Company *vs.* The Enterprise Mining Company. Vestal *vs.* Jumbo No. 2. *In re* Kirby's affidavit October 23rd, 1889. Original. Filed Nov. 12, 1892. Robert Bailey, clerk. Charles H. Toll.

UNITED STATES OF AMERICA, }
District of Colorado, } *ss:*

Affidavit of Louis D. Ricketts.

In the Circuit Court of the United States within and for said District.

THE RICO-ASPEN CONSOLIDATED MINING COMPANY *et al.*, Complainants,
vs.
THE ENTERPRISE MINING COMPANY, Defendant.

Louis D. Ricketts, being duly sworn, deposes and says: That he is a mining engineer. That he has for the past ten years practiced his profession in the Rocky Mountain region, and more particularly in Colorado, Wyoming and Arizona. On or about the 7th day of November, 1892, he proceeded to Rico, Colorado, and from the 9th to the 21st of November inclusive he occupied himself in making an examination of certain portions of the properties of the Enterprise Mining Company and of the Rico-Aspen Consolidated Mining
Company being situate on what is known as Newman hill
234 and lying near the base of Dolores mountain, said examination being more particularly of workings and excavations underneath the surface ground of the Eureka, Jumbo, Jumbo No. 2, Hiawatha, Selenide, Old Discovery, Vestal, Contention and Compromise Lode mining claims, and claims adjacent thereto.

The workings examined show portions of Newman hill in which they are situated to be made up of alternating strata of coarse sandstones and shales of various thickness. In the upper workings of these mining claims there are two layers of shale that are different from those encountered at a lower horizon. They appear to be

more argillaceous, and are separated from each other by a stratum of limestone which is sometimes less than a foot in thickness, and never more than three feet thick where examined.

The shale underlying the limestone is so highly carbonaceous as to be almost black in color as exposed where it is always moist underground. It is finely laminated or bedded, and possesses a well-developed series of joining planes. It is quite brittle and easily shattered. The shale overlying the limestone is brown, drab or gray in color, especially towards the base, although sometimes there are some laminæ of black carbonaceous shale. Taken as a whole this stratum is the softest bed of rock exposed in the workings, and under the pressure and strain to which it has been subjected it has acted partly like a viscous body, somewhat like putty, rather than as a brittle rock would act when subjected to similar pressure and strain.

All the strata exposed in the workings belong to the same geological age and series, *i. e.*, to the carboniferous series proper. The various strata, while they show the variations in thickness normal to such rocks lie conformable one upon the other. Owing to dynamic forces they have been tilted from their originally horizontal position, so that they now have in this locality a general dip to the southwest or south-southwest, varying between 8° and 15°. The rock strata have become broken by numerous faultings and fissurings, and actual displacement of the quite regularly dipping beds have resulted.

In the immediate vicinity of Rico the displacement has in one instance at least been very great, probably several hundred feet, but in the ground examined as above mentioned no fault or a displacement greater than 20 or 25 feet was found. Usually the displacement was between 2 and 10 feet, and in some instances it was scarcely appreciable. Where the displacement of the strata has been comparatively small, and yet appreciable, the fault is
235 clear cut and well defined in the lower members or the rock strata and rises as a clearly defined fissure or break to or into the black shale already referred to. Here the fault fissure splits up into a number of irregularly diverging branches or minor fissures, and distributes itself through a narrow band having a course corresponding to the strike of the main fault fissure underneath, and changes from a clear and well-defined fault to an abrupt fold of shattered and broken rocks, as illustrated by a diagram attached hereto and made a part of this affidavit, and marked Exhibit A.

The shale overlying the limestone does not appear to be so badly shattered as the strata immediately below, and owing to its soft character, the subfissures appear to be more or less closed and effaced, so that the faulting appears to have merged into an actual fold, and the displacement is only shown by a decided thinning of this stratum on the line above the fault fissure.

Where the displacement of the strata has been as much as six feet or more, the fault is usually sharply cut and well defined in the lower stratum but in passing through the shales and limestone above the displacement is distributed and taken up partly as a

shattered fold, and partly as one or more sharp and well-defined breaks in and actual displacement of these rocks.

While the fault fissures vary considerably in their course and dip, they are very plainly subdivided into two general groups; one having a general northeasterly and southwesterly course and an almost vertical dip; the other having a general course somewhat west of north, and not so steep a dip, their inclination being easterly at an angle between 40° and 65°; but classified as they are into two series by their course and dip, they are still more strongly separated by the radically different types of fissure veins which occupy the fissures of the faults themselves. Those fault fissures having a trend of northeast and southwest, and which stand almost vertically, have a vein filling consisting of quartz and a mixture of quartz rhodonite and rhodochrosite associated with sulphides of various metals, chiefly zinc, iron and copper, and certain minerals exceedingly rich in silver. They vary in thickness between the limits of an inch and several feet, but are not often less than six inches thick. They are exceptionally persistent and well defined, and furnish a surprising amount of pay-stoping ground along their course for distances almost commensurate with the drifts upon them. They possess, aside from the positions they occupy, many strong evidences of their nature as true fissure veins. Upon following one of
236 these vertical fissure veins upward from the lower strata exposed in the mine, its nature as a true fissure in no way changes, and it continues as a single body of vein filling up to and often into the black shale. Here the veins usually split up and following the splitting of the fault fissure at this horizon as hereinabove described, and pass upward as a series of irregularly diverging breaks, connected by a network of seams corresponding to the lines of fracture in the broken fold already referred to as occurring where faults cross this horizon. When the black shale and limestone are actually faulted and displaced at least one seam is made larger than the rest. Beneath the drab or gray shale lying over the limestone these seams appear to suddenly enlarge so that they unite and form one body of ore, which, in affiant's judgment, constitutes the apex of the vein, because the ore and vein filling seems to exist here, and is not known to occur higher up along the course of the vertical faults.

Those faults having a course somewhat west of north, and dip to the east, contain as a rule little or no manganese minerals, but chiefly a friable white sugary quartz as a vein filling, and are usually characterized by the presence of an inch or more of clay gouge upon either wall. While the quartz usually carries some iron pyrites and zinc, and sometimes gives high assays, these veins seldom contain *ore* below the horizon of the black shales. Like the vertical veins they usually split up into small veinlets as they pass through the black shale and limestone, and these veinlets reunite below the gray or drab shales into an apex. When these cross-veins are strong and well developed in the lower strata, they frequently make ore bodies along the apex. When they are small and insignificant the ore appears to be of small extent or altogether

absent. Where the vertical veins and cross-veins intersect, the amount of ore at their joint apex seems to be greater than at other points.

The accompanying map filed herewith and marked "Ricketts' Ex. B" represents the works in and adjacent to the ground in dispute. Those workings in yellow represent drifts passing along the apices of ore bodies or driven on the lower portion of the gray shales, the region of the limestone stratum, and the upper portion of the black shales, and develope portions of the vertical and cross-veins that contain ore.

The level colored pale black represents a series of horizontal drifts forming an intermediate level between the group level and the apices of the various veins. The blue color represents the Group tunnel level, and the red color the main workings of the Vestal and Aspen shafts. The main workings at the Vestal and Aspen shaft levels, which are some sixteen feet above the level of the
237 Group tunnel and the level of the Montezuma shaft which is some twenty feet below the same.

The Group tunnel of the defendant company passes in a southeasterly direction for a distance of over two thousand feet from the surface into Newman hill. While it is slightly on the dip of the strata and constantly though slowly reaches a higher plane in the series of rocks through which it passes, it is always low down in the series and intersects the Jumbo vein considerably more than one hundred feet below its apex. In its course it intersects a number of vertical veins, including the Swansea vein No. 1, Enterprise, Song Bird, Hiawatha, Eureka and Jumbo.

The Group tunnel intersects the Jumbo vein at a distance of about 1,925 feet from the surface, and passes on beyond about 160 feet. In this distance it intersects no other vertical vein beyond the Jumbo. Shortly northwest of its intersection with the said vein a station is made and two drifts curve towards and into the vein and follow it in a northeasterly and southwesterly course respectively. The former drift is about 150 feet in length, the latter about 360 feet. After striking the vein a short distance from the tunnel they both appear to follow it continuously and without interruption.

At the intersection of the tunnel with the Eureka vein a drift follows this vertical vein to the Jumbo west side line a distance of about 800 feet. Some 700 feet in on this drift from the Group tunnel a cross-cut from the Jumbo shaft, called the "Jumbo cross-cut" and so marked on the map, crosses on at grade and follows a general southeasterly course for a distance of about 400 feet beyond the Eureka vein, where it strikes a well-defined vertical vein, which, in the opinion of the affiant, and for reasons given hereinafter, is the same vertical vein developed in the Group tunnel and known as the "Jumbo vein." From the intersection of the Jumbo cross-cut with this vertical vein at or about the raise marked "R. 2 J." on the map drifts pass in a general northeasterly and southwesterly course, respectively. The former passes from R. 2 J. a distance of about 200 feet, and then crosses the northwest line of the Vestal claim, extends downward, and continues on and across the north-

east side line of the Vestal and beneath the surface ground of the Compromise claim. In all this drift extends more than 400 feet from the raise 2 J, and its face is within about 225 feet of the heading on the Jumbo vein driven southwesterly from the Group tunnel.

238 Southwest from raise 2 J a drift follows the vein to the west side line of the Jumbo claim and beyond. Here a winze leads directly to the Montezuma level, from which another drift follows southwest upon the same vein a distance of about 230 feet. In all the vein has been traced a horizontal distance of 850 feet, more or less, by these various drifts, and is, in the opinion of the affiant, to all practical purposes continuous, it having been merely displaced for a few feet or turned temporarily from its general trend but in a few instances. At or near the face of the drift on the vein beyond winze A, the vein which had for a short distance been thrown into the southeast wall reappears in the drift with its normal strength and thickness, and showing pay ore, and resumed a trend that leads it directly towards the heading on the vein from the Group tunnel, and the latter heading is leading directly towards the vein as exposed from the drift northeast past winze A.

For these and other reasons there is left in the opinion of the affiant no doubt but that the vein exposed 160 feet from the present face of the Group tunnel and that exposed by the drifts from the Jumbo cross-cuts are one and the same.

The Jumbo vein may be taken as a type of the vertical veins exposed from the workings examined in Newman hill. It stands almost vertical, but has a slight dip to the southeast. The vein filling consists of quarts and r-odenite, associated with zinc, blend, and other metallic sulphides, carrying silver. It exposes what the affiant believes to be good pay ore in the most northeasterly and southwesterly points developed and at distances of about 140 and 10 feet, respectively, from the apex of the vein, and almost continuously along the course of the vein as exposed in its drifts and workings. The walls do not match each other, but the bassett edges of the strata forming them show considerable displacement, probably six feet in all. Two specimens, one black of shale from the southeast wall, the other of course sandstone from the northwest wall of the vein, were taken at opposite points and show very plainly the displacement of the walls relatively to each other. In the opinion of the affiant, the gray or drab shales overlie the apex of this vein here as in all cases of veins in the ground examined. The apex of the vein is at this horizon, and does not appear to extend in any case to the surface but ceases beneath this rock in place several hundred feet beneath the claims situated directly over it. The affiant has carefully examined various workings that are accessible and shown upon the map, more especially the levels passing from the Vestal and Aspen shafts and the more southerly portion of the Montezuma drift, and the levels and drifts connecting

239 & 240 therewith through raises, and also the workings in the Jumbo vein and to the northwest thereof. He has carefully examined the veins exposed, and the various bodies of ore

wherever they occur, and in his opinion and to the best of his knowledge and belief, all such bodies of ore are directly connected with and form a part of the system of vertical and cross-veins heretofore mentioned, and either occupy the position of their filling in depth, or as portions of the apices thereof.

LOUIS D. RICKETTS.

Subscribed and sworn to before me, this 25th day of
[SEAL.] November, A. D. 1892.

CHARLES W. WATERMAN,
Notary Public.

My commission expires Nov. 26th, 1894.

(Here follow map marked page 241.)

242 & 243 Indorsed. No. 2827. Circuit ct. of the United States. In chancery. The Rico-Aspen Consolidated Mining Company *et al. v.* The Enterprise Mining Company. Affidavit of Louis D. Ricketts on behalf of defendant. Filed Nov. 25, 1892. Robert Bailey, clerk.

UNITED STATES OF AMERICA, }
District of Colorado, } *ss:*

In the Circuit Court. In Equity.

THE RICO-ASPEN CONSOLIDATED MINING COMPANY *et al.*,
Plaintiffs,
vs.
THE ENTERPRISE MINING COMPANY, Defendant. } No. 2827.

STATE OF COLORADO, }
County of Arapahoe, } *ss:*

C. S. Batterman, being first duly sworn, deposes and says:

That he is a mining engineer and has been practising his profession for a period of thirteen years, in California, Nevada, Montana, Arizona, New Mexico, and elsewhere; that he has made a personal examination of the underground workings of certain properties of the Rico-Aspen Consolidated Mining Company and the Enterprise Mining Company, on Newman hill, at the base of Dolores mountain, near Rico, Colorado, and especially of workings under the surface of the Eureka, Jumbo, Jumbo No. 2, Hiawatha, Selenide, Old Discovery, Vestal, Contention and Compromise Lode mining claims; that said examination was commenced on the 16th day of November, 1892, and was prosecuted continuously and diligently until and including the 21st day of November, 1892, and affiant states as a result of his investigations, as follows:

That the country at and in the immediate vicinity of the ground in controversy, consists of strata of sedimentary rock; that these strata consist principally of shales, sandstones and slates, interstratified one with the other, and that there is at least one thin

medial plane of the true fissure extended upward. Only rarely has affiant found any ore on the limestone upon the hanging-wall side of the vein.

By inspection affiant states that the lower side of the gray shale, and the limestone, except in connection with a cross or vertical vein, shows no sign of mineralization, nor does affiant believe that any pay ore or ore of any description can be found away from said veins, upon or near the limestone stratum.

Affiant further states, that in his opinion the ore found immediately under the soft gray shale is a part of the vein beneath, and can have no existence or origin independent of said vein, and that the mineralization of said veins extends to great depths below the gray shale, in one case a distance of two hundred and seventy feet below said gray shale, at which depth affiant obtained a specimen of mineralized quartz, which is produced with this affidavit and marked "Exhibit C," and which specimen assayed, 08 ozs. gold, 7.5 oz. silver 16.9 % lead & 12.8 % zinc, and affiant states that there are no workings below the said point from which said specimen was taken, to wit: two hundred and seventy feet below said gray shale.

The Jumbo vein is from three inches to two feet or more in thickness, has been drifted upon for about fifteen hundred feet within the ground examined by the affiant, and contiguous to the Group tunnel has been stoped continuously for a distance of three hundred feet, and ore still remains at either end of said stope, and at the northeast end of the level run northeasterly upon said Jumbo vein good ore can be found at a depth below the gray shales of about one hundred and twenty feet, below which point there are no workings known to affiant upon said Jumbo vein.

Affiant further states as a result of his examination of said premises, that he believes, that the vein drifted upon northeasterly and southwesterly from the Group tunnel, and herein referred to as the Jumbo vein, is the same vein exposed in the drifts running easterly and westerly from the so-called Jumbo cross-cut vein and from winze "A," and that the face of the drift extending east-
247 & 248 erly from winze "A" and the face of the drift extending southwesterly from the Group tunnel upon said Jumbo vein were on the afternoon of November 21st, 1892, not to exceed two hundred feet apart.

C. S. BATTERMAN.

Subscribed and sworn to before me this 25th day of
[SEAL.] November, A. D. 1892.

CHARLES W. WATERMAN,
Notary Public.

My commission expires Nov. 26, 1894.

(Here follow 2 maps marked pp. 249 & 250.)

251 Indorsed: No. 2827. Circuit court of the United States. In chancery. The Rico-Aspen Consolidated Mining Com-

wherever they occur, and in his opinion and to the best of his knowledge and belief, all such bodies of ore are directly connected with and form a part of the system of vertical and cross-veins heretofore mentioned, and either occupy the position of their filling in depth, or as portions of the apices thereof.

LOUIS D. RICKETTS.

Subscribed and sworn to before me, this 25th day of
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UNITED STATES OF AMERICA, } ss:
District of Colorado, }

In the Circuit Court. In Equity.

THE RICO-ASPEN CONSOLIDATED MINING COMPANY *et al.*, Plaintiffs, *vs.* THE ENTERPRISE MINING COMPANY, Defendant. } No. 2827.

STATE OF COLORADO, } ss:
County of Arapahoe, }

C. S. Batterman, being first duly sworn, deposes and says:

That he is a mining engineer and has been practising his profession for a period of thirteen years, in California, Nevada, Montana, Arizona, New Mexico, and elsewhere; that he has made a personal examination of the underground workings of certain properties of the Rico-Aspen Consolidated Mining Company and the Enterprise Mining Company, on Newman hill, at the base of Dolores mountain, near Rico, Colorado, and especially of workings under the surface of the Eureka, Jumbo, Jumbo No. 2, Hiawatha, Selenide, Old Discovery, Vestal, Contention and Compromise Lode mining claims; that said examination was commenced on the 16th day of November, 1892, and was prosecuted continuously and diligently until and including the 21st day of November, 1892, and affiant states as a result of his investigations, as follows:

That the country at and in the immediate vicinity of the ground in controversy, consists of strata of sedimentary rock; that these strata consist principally of shales, sandstones and slates, interstratified one with the other, and that there is at least one thin

stratum of limestone rock, lying immediately below the stratum of gray shale; that the said strata, herein mentioned, all dip to the southwest at an angle of about ten degrees from the horizontal; that while the strata have in places, for short distances, dips of greater or less degree, even in some cases a reverse dip, yet the general dip over any considerable extend of ground is to the southwest; that the aforesaid limestone stratum is from one foot to three feet in thickness, generally, however, being about eighteen inches thick; that this limestone stratum is between a bed of laminated
244 black shale of five or six feet in thickness below, and a bed of soft gray and in places brecciated, shale, above; that the thickness of this upper or gray shale is over six feet; that in the immediate vicinity of the Jumbo vein this gray shale is about three hundred and fifty feet below the surface of the mountain; that below said gray shale the stratified rocks are intersected by a network of true fault fissure veins; that these veins may be divided into two groups, the first group having a strike that approaches northeast and southwest. The dip of this first group, except in one instance noted by this affiant, is nearly vertical. The veins of the first group vary in thickness from one inch up to four feet, and have for a vein filling white quartz and rhodochrosite, more or less intimately united and blended, with more or less clay as a selvage. The veins of the first group will be hereafter designated as vertical veins and are ore-bearing and usually pay veins.

The second group have a strike that approaches north or a little west of north, and they usually dip towards the east, with a dip of from thirty to seventy degrees from the horizontal. This group will hereafter be designated as cross-veins. They have a thickness varying from one-fourth of an inch to two feet. The filling of the cross-veins is usually quartz, slate and shale, and rarely rhodochrosite. The cross-veins at times carry ore but are seldom pay veins.

The relative age of the respective systems, herein mentioned, is in doubt; but it appears, that selecting any cross-vein it may be younger than some vertical vein and older than another vertical vein. All the larger veins of both systems occupy fault fissures. The amount of vertical displacement varies from a few inches to fifteen feet or more. This faulting or movement of one wall relatively to the other wall, and the fissure character of the vein, is proved, first, by the flat-lying strata upon the one side not agreeing with or matching the strata upon the opposite side of the fissure; second, by the faulting of a vein of one system by a vein of the other; third, by the deeply cut striations or grooves shown in places upon the walls; a fourth, though a not conclusive argument, is the gouge found upon the walls; fifth, the banded structure of the vein filling; sixth, the fissures extending continuously for very great distances, cutting all sorts of strata at all degrees of angle of intersection, one vein being followed continuously by this affiant, upon its strike, for two thousand feet.

The vertical veins are true fissures of considerable magnitude until in their upward course they reach the black laminated shale,

at which point they usually split up into a multitude of vein-
245 lets, radiating from the larger fissure below, upwards in cross-section, as the ribs of a fan, until they end against the overlying gray shale. At times, however, the main fissure retains its continuity upwards through the black shale and limestone and ends abruptly at the gray shales. In the first or fan-like structure, the black shales and limestone are usually very much bent and shattered, but not faulted, as illustrated by cut "A" attached hereto and made a part of this affidavit.

In the second case, the black shale and limestone is faulted as illustrated by cut "B," attached to this affidavit and made a part hereof. In neither case is the soft overlying gray shale faulted, but it assumes the contour of the strata beneath it, as would a mass of soft putty. In no case known to the affiant does the fissure extend above the soft gray shale. Very frequently, considerable bodies of ore, usually of a pipe shape, are found immediately below the soft gray shale. Affiant believes, however, that in every instance these pipe-shaped ore bodies are immediately over or contiguous to a vertical or cross vein and are always connected with said vein by the radiating veinlets, or by a direct and large fissure vein. In cut "A," the fan-like veinlets are shown and immediately below the gray shale and terminating said veinlets, is shown by the black shading, a cross-section of such a pipe-like ore body. Such ore pipes have their axis parallel to the veins over which they are found and with which they are always connected. Said pipes have a variable transverse extension, usually not greater than five or six feet. In fact, an ordinary mining drift, in the majority of cases examined by this affiant, extracts all the ore.

At various places where a large vertical vein is intersected by a cross-vein, or, as sometimes occurs, by several cross-veins, parallel and near each other, the pipe expands into a sheet of considerable extent. In the total, however, the aggregate area of said pipes and sheets is very small as compared with the total area of explored ground. To estimate from the map of the workings and from observation, affiant believes that the total area of ore-producing workings upon the limestone stratum, does not exceed one-tenth of the area that has been explored.

The Jumbo vein, being a vein running longitudinally through the claim known as Jumbo No. 2, is a vertical fault fissure, possessed of all the general characteristics before described, except that the fan-like termination is not so general as is the case of the other vertical veins explored, but on the contrary the vertical displacement is much greater than usual, exceeding four feet, and said dis-
246 placement is so large as to generally produce a clean-cut single fissure through the laminated black shale and limestone, as shown in cut "B," appended hereto.

The black laminated shales and limestone are bent downwards on the foot-wall side of the Jumbo vein to a great extent, and the ore solutions have passed up and deposited the ore on top of said bent limestone. The amount of ore becomes less as the strata take their normal dip and ceases entirely at five or six feet from the

medial plane of the true fissure extended upward. Only rarely has affiant found any ore on the limestone upon the hanging-wall side of the vein.

By inspection affiant states that the lower side of the gray shale, and the limestone, except in connection with a cross or vertical vein, shows no sign of mineralization, nor does affiant believe that any pay ore or ore of any description can be found away from said veins, upon or near the limestone stratum.

Affiant further states, that in his opinion the ore found immediately under the soft gray shale is a part of the vein beneath, and can have no existence or origin independent of said vein, and that the mineralization of said veins extends to great depths below the gray shale, in one case a distance of two hundred and seventy feet below said gray shale, at which depth affiant obtained a specimen of mineralized quartz, which is produced with this affidavit and marked "Exhibit C," and which specimen assayed, 08 ozs. gold, 7.5 oz. silver 16.9 % lead & 12.8 % zinc, and affiant states that there are no workings below the said point from which said specimen was taken, to wit: two hundred and seventy feet below said gray shale.

The Jumbo vein is from three inches to two feet or more in thickness, has been drifted upon for about fifteen hundred feet within the ground examined by the affiant, and contiguous to the Group tunnel has been stoped continuously for a distance of three hundred feet, and ore still remains at either end of said stope, and at the northeast end of the level run northeasterly upon said Jumbo vein good ore can be found at a depth below the gray shales of about one hundred and twenty feet, below which point there are no workings known to affiant upon said Jumbo vein.

Affiant further states as a result of his examination of said premises, that he believes, that the vein drifted upon northeasterly and southwesterly from the Group tunnel, and herein referred to as the Jumbo vein, is the same vein exposed in the drifts running easterly and westerly from the so-called Jumbo cross-cut vein and from winze "A," and that the face of the drift extending east-
247 & 248 erly from winze "A" and the face of the drift extending southwesterly from the Group tunnel upon said Jumbo vein were on the afternoon of November 21st, 1892, not to exceed two hundred feet apart.

C. S. BATTERMAN.

Subscribed and sworn to before me this 25th day of
[SEAL.] November, A. D. 1892.

CHARLES W. WATERMAN,
Notary Public.

My commission expires Nov. 26, 1894.

(Here follow 2 maps marked pp. 249 & 250.)

251 Indorsed: No. 2827. Circuit court of the United States. In chancery. The Rico-Aspen Consolidated Mining Com-

pany *et al. vs.* The Enterprise Mining Company. Affidavit of C. S. Batterman for defendant. Filed Nov. 25, 1892. Robert Bailey, clerk.

UNITED STATES OF AMERICA, } ss:
District of Colorado, }

Affidavit of Sidney W. Tyler.

In the Circuit Court of the United States within and for said District.

THE RICO-ASPEN CONSOLIDATED MINING COMPANY *et al.*, Complainants, *vs.* THE ENTERPRISE MINING COMPANY, Defendant. } No. 2827.

STATE OF COLORADO, } ss:
County of Arapahoe, }

Sidney W. Tyler, being duly sworn says: That he is a mining engineer, and a resident of Colorado; that he has been engaged in the pursuit of his profession in Colorado and other Western States and Territories for 24 years. During the last 16 years has been engaged in mining, in Gilpin county, and from time to time has made examinations of mineral deposits at various points in the State of Colorado, in the Territory of New Mexico, and in Mexico. That from the 7th day of November to the 21st inst. inclusive, he was engaged in the examination of certain portions of the mining premises of both parties to this suit under the order of this court permitting the examination thereof. The premises particularly examined embraced the Group tunnel and portions of the workings in the Enterprise, Hiawatha, Eureka, Jumbo, and Jumbo No. 2 claims of the defendant and of the Vestal, Compromise, Contention Selenide and Old Discovery or Montezuma claims of the complainants. That during the sixteen days occupied in such examination he made a specially careful examination of the workings of both parties to this suit upon the Jumbo No. 2 or Jumbo vein, so called, as well as of certain workings of both parties in the ore bodies referred to in the joint affidavit of Max Boehmer and his associates filed herein in behalf of the complainants as the "contact" ore bodies or deposits. The workings examined by affiant lie for the most part at a depth of from 200 to 500 feet beneath the surface of Newman hill, and embrace the Group tunnel, numerous levels, cross-cuts, winzes and upraises, made either in the vertical veins or the cross-veins or through the country rock or in the horizon
252 between the limestone stratum hereafter particularly referred to and the soft shales lying thereon. The rock mass of Newman hill consists of sedimentary rock, the strata of which incline to the south and southwest at an angle varying from 08 degrees to 17 degrees and averaging about 15 degrees; certain masses of so-called porphyry penetrate the stratified rock at different points; the stratification as disclosed in the workings examined

embraces alternating beds of sandstone and shales, with a bed or stratum of limestone from 12 to 30 inches in thickness and which limestone stratum occupies a certain fixed horizon or position in the series. The strata immediately above this limestone consist of from 5 to 20 feet of soft dark-colored carbonaceous shales overlaid by soft sandstone. Below the limestone is a stratum of dark laminated shales from 5 to 10 feet in thickness, below which is a stratum of harder sandy shale and lower still are alternating sandstone and shale strata. This mass is cut by a series of nearly vertical fault-fissure veins, having an approximate northeasterly and southwesterly course, and called the vertical pay veins; and by a series of cross-faults called cross-veins having an approximate no-th and south course, and a general dip of about 45 degrees to the east; both series of veins are true fault fissures. This is clearly shown by the fact that the strata are dislocated by them, *i. e.*, removed from their proper relative positions, so that the continuation of certain stratum of sandstone, for instance, seen on one side of a vein is found on the opposite side at a different elevation. The extent of such dislocation or throw was measured by affiant in several places, and found to be generally from 2 to 6 feet, although in other cases it was found to be more than 20 feet. The Eureka and Jumbo No. 2 veins are examples of the vertical pay veins, which affiant examined with care. Affiant is informed that the Eureka vein has been developed by continuous workings for about 5,000 feet in length, but his examination was limited to continuous workings in such vein for about 1,500 feet in length. Affiant found that such vein has the characteristics of a true fault-fissure vein, carrying continuous bodies of workable pay ore for the greater part of that distance, the ore therein consisting of a white quartz, rhodonite and rhodochrosite mass, having in it streaks of a mixture of the minerals, zinc-blende, gray copper and copper pyrites carrying silver and gold and being merchantable ore.

The vein filling is sharply defined from the stratified country rock on either side, and is generally separated therefrom by a seam of clay or a smooth-parting plane. The vein filling shows a banded structure in a very marked degree.

253 Affiant examined the Jumbo No. 2 vein so called through continuous workings from the Group tunnel southwest for a distance of 359 feet and to the northeast of the Group tunnel for a distance of 175 feet, and from the Jumbo cross-cut southwest and northeast for a distance of some 800 feet horizontally, making in all a distance of 1,334 feet. The vertical range of these workings is more than 100 feet measured from the tunnel to the top of the stopes; the total length of the levels, raises and stopes in the portion of said vein south of the Group tunnel line examined by affiant is not less than 2,000 feet. The two portions of the Jumbo No. 2 vein above referred to are separated by an undeveloped portion of the vein about 200 feet in length, the position of which clearly appears from the map, prepared by affiant and his associate witnesses in behalf of the defendant. Affiant is of the opinion that the workings above referred to by him as being upon the Jumbo No. 2 vein are

all within and upon the same identical vein, and in connection with this statement affiant says that the workings in the two portions of the vein above referred to show, first, that the vein at both points bears ore and contains a vein filling identical and similar in all respects; second, that the strike and dip in the breasts of the two approaching drifts now being run under the order of this court are such that if continued in their respective directions they will approximately meet; third, that no other vein has been cut in the portion of the tunnel now extended for a distance of 159 feet beyond said Jumbo No. 2 vein, and affiant believes that the vein disclosed in the Group tunnel, and therein called the Jumbo No. 2 vein, extends as a continuous fault-fissure vein through the ground lying between the ends of the drifts now being run by the defendant under the direction of this court. The Jumbo No. 2 vein as disclosed in the workings examined by affiant has all the characteristics of a true fault-fissure vein hereinbefore referred to in affiant's description of the Eureka vein, and the Jumbo No. 2 vein affords a characteristic example of the main vertical pay veins found in the premises examined. The vein varies in width from 6 inches to 2½ feet, and the pay ore therein varies in width from one to 18 inches. The value of such ore is from $40 to $300 per ton, as shown by assays of samples taken by affiant and his associate witnesses during such examination of the premises.

Stopes upon the Jumbo No. 2 vein have been made in the neighborhood of the Group tunnel over the tunnel level to the south and north of said tunnel, and also over the Eureka cross-cut level,
254 which said Eureka cross-cut level is 94 feet above the Group tunnel level. Affiant was present at the taking of samples of the ore in said vein at regular intervals of 25 feet along the floor of the Jumbo level running south of the Group tunnel, and also from the floor of the level in said vein running southwest from the Jumbo cross-cut, and affiant examined the bottom of the level going northeasterly from the Jumbo cross-cut, and from such examination affiant believes that the mineralization of the Jumbo No. 2 vein is practically continuous throughout the aforesaid workings, and affiant says that the mineralization of such vein extends downward into the earth below the deepest workings yet made.

The portion of the Jumbo No. 2 vein hitherto described lies within the lower and harder region of the stratified rocks. As the vein is followed in its upward course, at a certain height varying with the general dip of the formation toward the southwest, certain softer strata are encountered, within which the vein assumes a different aspect, although retaining the character of a fault-fissure structure. These softer strata consist, first, of thinly bedded black shales from 4 to 8 feet in thickness; second, of limestone from 12 to 30 inches in thickness; third, of soft drab and black shales from 6 to 20 feet in thickness; fourth, of soft sand rock.

As the vein in its upward course reaches the shale stratum underlying the limestone it separates into thin fissure seams, and is continued in such seams through such shale stratum and the overlying limestone stratum to the soft shale which overlies the limestone;

beyond which last-mentioned shale stratum it has not been traced in the workings observed by me. In connection with this seam upon this horizon bodies of ore of greater or less horizontal extent are found extending along the course of the fissure vein, the width of these ore bodies being usually limited to 4 or 5 feet on either side, and at many points not being of greater width than an ordinary drift. In my judgment these ore bodies in the soft shale overlying the limestone and capping the fault fissure from the true top or apex of the Jumbo No. 2 fault-fissure vein, and the occurrence of an ore body in this horizon is also characteristic of the other fault fissures of both systems noted by me in the premises examined.

In conclusion affiant states as the result of *of* his examination the he is of the opinion first, that the Jumbo No. 2 vein disclosed in the Group tunnel at a point about 1,920 feet from the portal is a true fault-fissure vein, and is the same vein followed by the defendant from the southwest into the premises claimed by the plaintiff as the Vestal and Compromise claims; second, that the pipe so
255 called of ore found along its upper portion and in the horizon between the limestone and overlying shale strata is the top or apex of said vein, and a part thereof.

SIDNEY W. TYLER.

Subscribed and sworn to before me this 25th day of November A. D. 1892.

[SEAL.] CHARLES W. WATERMAN,
Notary Public.

My commission expires Nov. 26th, 1894.

Indorsed: 2827. U. S. circuit court. In chancery. The Rico-Aspen Consolidated Mining Co. *et al. vs.* The Enterprise Mining Co. Affidavit of Sidney W. Tyler for defendant. Filed Nov. 25, 1892. Robert Bailey, clerk.

UNITED STATES OF AMERICA, } ss:
District of Colorado, }

Affidavit of Edward G. Stoiber.

In the Circuit Court within and for the District of Colorado.

THE RICO-ASPEN CONSOLIDATED MINING COMPANY *et al.*, Complainants,
vs.
THE ENTERPRISE MINING COMPANY, Defendant.

STATE OF COLORADO, } ss:
County of Arapahoe, }

Edward G. Stoiber, being duly sworn, deposes and says: That he is a mining engineer and has been practicing his profession for 14 years last past in the State of Colorado; that he has recently and between the 7th and 21st day of November, 1892, made a careful

examination of the underground workings of the properties of the plaintiff and defendant respectively, on Newman hill at the base of Dolores mountain near Rico, Colorado, and especially the underground workings beneath the surface of the Eureka, Jumbo, Jumbo No. 2, Hiawatha, Selenide, Old Discovery, Vestal, Contention and Compromise Lode mining claims, and as the result of such examination deponent makes the following statement:

The formation in which the exploitations for valuable minerals has been and is now being carried on in said properties consists of alternating strata of sandstones and shales, having an approximate southerly dip. Between the same occurs a bed of grayish limestone of an average width of about two feet. Immediately
256 underlying this limestone is found a black shale of from 7 to 12 feet in thickness, and this rests upon alternating gray sandstones and drab to greenish-colored shales. The shale overlying the sandstone is drab or gray colored and is generally softer than the underlying shales.

The formation is traversed by two systems of fissure veins, one having a general northeast and southwest strike, with an almost vertical to a slightly southeasterly dip, the other having approximately a north and south strike, with a dip to the east varying between forty degrees and seventy degrees. The northeast or "vertical pay veins," as they are locally called, are readily distinguished from the north and south or "cross veins:" 1st. By their vein filling, which consists of pure white quartz, or rhodochrosite, and of the minerals zinc-blende, iron and copper pyrites, accompanied by some of the richer silver minerals, such as argentite, gray copper, ruby silver, polybasite, etc., while the cross-veins rarely carry anything more than a quartz filling and some finely divided iron pyrites and always a gouge, although occasionally a little zinc-blende and rhodonite are also found.

2nd. By their greater width, the vertical veins rarely showing a width of less than eight inches, while the cross-veins are generally but from one to three inches wide and rarely reach a width of one foot.

Both systems of veins fault the formation through which they pass and not uncommonly do they fault each other as well. In following the veins of both systems upward, they are invariably found to hold their width until they reach the black shale underlying the limestone, when they begin to divide into numerous small veins, which continue their irregular upward course through this shale and its overlying limestone, terminating in their upward course in the form of a body of mineral at and near the intersection of the veins, with the plane separating the limestone from the overlying gray shales. The limestone itself often becomes sufficiently mineralized by the little vein branches passing through the same near the apices of the veins, as to become valuable as a shipping product. The ore accumulations found at and near the intersection of the veins with the upper plane of the limestone are variable in extent. 1st. Laterally (excepting where veins of the two systems cross each other), they often do not exceed the width of an ordinary drift,

or they may reach a width of ten feet or more from said lines of intersection between the planes of the veins and the upper plane of the limestone, either on one side or on both. There appears to be no gradual transition from pay ore to absolutely worthless ore in testing (by assay) these ore accumulations laterally from
257 the veins on the plane of the limestone, but a sudden drop in values from ore of shipping grade to ore that will probably never be made available by any concentrating or milling process now in use. Where veins of the two systems cross each other there may occur an accumulation of ore thirty feet wide. 2nd. As to the longitudinal extent of these ore accumulations, I believe it to be a fact that where the vein immediately underneath the black shale is barren or lean, there is a correspondingly lean and small accumulation of ore above these lean spots at or in the vicinity of the upper plane of the limestone. This statement can be verified only on the vertical pay veins, inasmuch as in this system of veins alone is there any stoping being carried on in the portions of the plaintiffs' and defendant's properties examined by me. If in exploring the limestone-shale horizon, by means of prospecting drifts or inclines, ore is struck and followed; one would naturally look for the vein in the workings under the black shale of a strike corresponding with that of the ore zone or pipe developed on the limestone-shale horizon, so intimate seems to be the relation between the ore accumulations there and the veins developed in the workings under the black shale.

A careful study of the faces of the drifts on the Jumbo vein, being the vein running longitudinally through the Jumbo No. 2 Lode mining claim, now running towards each other northeasterly and southwesterly respectively, as they appeared on November 20th, 1892, when they appeared something near two hundred feet apart taken in connection with a knowledge of the courses of such drifts in their last fifty feet, lead me to the conclusion that they will inevitably break into each other and prove to be on ore and in the same vein, to wit, the Jumbo vein. The breast of the Group tunnel on November 20th, was 159 feet beyond the point where the Jumbo vein crosses said tunnel, and in that whole distance no signs of a vein which might possibly be taken for the vein upon which a drift is now running northeasterly from the Jumbo cross-cut were discovered.

The vein herein mentioned as the Jumbo vein is one of the best marked and most clearly defined vertical veins found in the properties examined by me, and is very persistent, both on its strike and its dip as it descends into the earth, and in my opinion the same is
258 a distinct and separate vein from any other vein of ore bodies found in said workings, and has its apex at a great distance below the surface of the earth and immediately under the gray shale, hereinabove described.

EDWARD G. STOIBER.

[SEAL.] Subscribed and sworn to before me this 25th day of November, A. D. 1892.

CHARLES W. WATERMAN,
Notary Public.

My commission expires Nov. 26th, 1894.

Indorsed: No. 2827. United States of America, district of Colorado. In the circuit court. The Rico-Aspen Consolidated Mining Company *et al. v.* The Enterprise Mining Company. Affidavit of Edward G. Stoiber on behalf of defendant. Filed Nov. 25, 1892. Robert Bailey, clerk.

UNITED STATES OF AMERICA, *District of Colorado,* } ss:

In the United States Circuit Court.

THE RICO-ASPEN CONSOLIDATED MINING COMPANY *et al.* *vs.* THE ENTERPRISE MINING COMPANY. } No. 2827.

George S. Raymer, being duly sworn deposes and says that he is a mining engineer by profession, and has for ten years past been practicing his said profession in the mining regions of the State of Colorado. That deponent has examined the various underground workings connected with the properties of the plaintiff and defendant in this action, on Newman hill, at the base of Dolores mountain, near Rico, Colorado, and especially the workings lying beneath the claims known as the Eureka, Jumbo, Jumbo No. 2, Hiawatha, Selenide, Old Discovery, Vestal, Contention and Compromise Lode mining claims. That said examination was commenced on the 10th day of November and continued steadily until and including the 21st day of November, 1892, and as the result of said examination deponent says, that he finds the geological condition in said property to be a succession of strata of sandstone, black shale, limestone and soft shales superimposed the one upon the other; said strata being of various thicknesses and having a gentle normal slope to the southwest.

Those strata situated below the gray shale are traversed for long distances by two classes of fault fissure veins. The first class consists of strong vertical veins having an average strike of northeast and southwest, and are fault fissures, as shown by the displacements of the strata on each side of the vein, by their faulting veins
259 which cross them and by the banded structure of their vein filling. These veins, a good sample *fo* which is the Jumbo vein, being the vein extending longitudinally through the claim known as Jumbo No. 2, cut strongly through the country rock, at a great angle to its stratification planes, and when not bent or faulted by a cross-vein keep their direction well. They have for vein matter rhodochrosite and quartz and are accompanies by a clay gouge.

The second class of veins in this property are the cross-veins.

They are not as a rule as wide as the vertical veins above mentioned, and they have less dip, carry very little rhodochrosite and very little mineral, and consist for the most part of white quartz accompanied by a gouge. They are well defined and continue for long distances apparently, as shown by their crossing the different drifts and cross-cuts without materially losing their course and dip except where influenced by some crossing fault.

As both these classes of veins in their upward course approach the stratum of gray shale above mentioned, the shale, owing to its softness and pliability has apparently been made to yield and stretch by the fault fissure sufficiently to allow the limestone and the black shales lying below the gray shales to be either fractured transversely, or to be faulted, so that the mineral solution has been able to pass through these fractures and faults and to form pipes of ore on the top or to one side of the veins and immediately below the gray shales. These pipes of ore are of varying width and often so narrow as to be completely removed by an ordinary mining drift four feet wide. I find that all the ore bodies which lie directly below the gray shale, and which I have been able to examine, are directly connected with or form the top of either a cross or vertical vein, this connection being made in either of two ways: By small veinlets passing upward through black shale and limestone from the main fissure below, or by the direct continuance of the fault fissure vein through said black shale and limestone to the soft gray shale above.

And in examining the ground immediately under the gray shales, I find that the ore bodies cease as we depart laterally from the fault fissure along the under surface of said gray shale, and that the amount of ground at and about the juncture of the gray shale and the limestone which is barren is very large in proportion to the area of the ore bodies above described situated over the fissure veins herein mentioned.

The Jumbo vein above mentioned has been drifted on over 1,500 feet within the ground examined, and except where deflected
260 by a crossing of two veins near the southwest end, maintains a persistent course of approximately north seventy degrees east. In its northeastern portion, where the vein is at least 120 feet below the horizon of the limestone above mentioned as lying immediately below the gray shales, there is in sight a strong face of quartz of about eight inches in breadth, carrying ore.

Deponent further states that from his examination of the location, direction and character of the vein, which is being drifted on in a northeasterly direction from winze A in the Jumbo No. 2 vein, and the vein which is being drifted upon southwesterly from the Group tunnel within the claim known as Jumbo No. 2, deponent is of the opinion that the two are one and the same vein, and that the workings upon the same will meet each other within a distance of 200 feet, being the distance which now practically separates the breasts of these two workings.

Deponent further states that so far as this affidavit states distances or altitudes, they are approximate only and made upon in-

formation and from the best estimate which witness can make, without actual personal survey.

GEORGE S. RAYMER.

[SEAL.] Subscribed and sworn to before me, this 25th day of November, A. D. 1892.

CHARLES W. WATERMAN,
Notary Public.

My commission expires Nov. 26th, 1894.

Indorsed: No. 2827. Circuit ct. of the United States. In chancery. The Rico-Aspen Consolidated Mining Company *et al. v.* The Enterprise Mining Coompany. Affidavit of George S. Raymer on behalf of defendant. Filed Nov. 25, 1892. Robert Bailey, clerk.

UNITED STATES OF AMERICA, *District of Colorado*, } *ss:*

In the Circuit Court. In Equity.

THE RICO-ASPEN CONSOLIDATED MINING COMPANY *et al.*, Plaintiff-, *vs.* THE ENTERPRISE MINING COMPANY, Defendant. } No. 2827.

STATE OF COLORADO, *County of Arapahoe*, } *ss:*

Henry Hobart Knox, of lawful age, being first duly sworn, deposes and says:

261 That he is by profession a mining engineer and has practiced his profession for a period of six years, in the Kingdom of Spain and in the Territory of Arizona, in the United States, and to some extent in the State of Colorado.

Affiant further states that he has made an examination of the mining properties belonging to the plaintiff and defendant, situated upon Newman hill, at the base of Dolores mountain, near Rico, Colorado, and especially of the underground workings beneath the surface of the Eureka, Jumbo, Jumbo No. 2, Hiawatha, Selenide, Old Discovery, Vestal, Contention and Compromise Lode mining claims; that said examination commenced on the 9th day of November, 1892, and was completed November 21st, 1892.

Affiant states that the ground examined consists of alternate strata of sandstone and shale, on the upper horizon of which is a bed of black shale, followed by a thin stratum of limestone, on which rests a stratum of soft, argillaceous gray shale, over which lies a bed of sandstone.

The general dip of the strata is to the southwest. This sedimentary formation is cut by two systems of fissure veins; one, called locally vertical pay veins, having a general northeast and southwest strike; the other, called cross-veins, having a general

strike a little to the west of north, and dipping mostly in an easterly direction.

The dip of the vertical pay veins varies but little from the vertical, and these veins are distinguished from the cross-veins in general, not only by their strike, but by being thicker, by carrying more valuable ore, and by having a greater dip. The vein filling of the vertical veins consists of rhodochrosite and white quartz blending together, yet showing with the mineral a decided banded structure. That these veins occupy fault fissures is clearly shown by the difference of the rock forming the two walls, on the same horizontal plane, the displacement of the walls of these veins often amounting to several feet. The cross-veins are usually very narrow, as compared with the vertical pay veins, their thickness seldom reaching eight inches. The vein filling of the cross-veins consists of white quartz, occasionally carrying rhodochrosite, and usually displaying more or less gouge. These veins also occupy fault fissures as a rule, the displacement varying from a few inches to several feet.

The Jumbo vein, situated in Jumbo No. 2 Lode mining claim, has been examined by affiant for the whole length developed in the Enterprise workings, and in the contiguous workings of the Rico-Aspen, and in the opinion of the affiant the said Jumbo vein
262 is a true fault fissure vein. It lies about parallel to the Eureka vein, which the affiant understands has been followed for a horizontal distance of five thousand feet. It has a dip varying but little from the vertical, and has been followed by affiant in his examination for a vertical distance of over one hundred and thirty feet, without seeming to vary in general thickness. It displays a combed and banded structure, and the displacement of one wall in relation to the other is demonstrated by the character of the rock on the one wall as compared with that of the other wall. For example, a horizontal line drawn across the vein might cut sandstone on one wall and shale on the other. The faulting of one wall in respect to the other on the Jumbo vein has been observed in places to have a drop of at least five feet. This vein carries white quartz, rhodochrosite and sulphurets, and varies in thickness from less than one foot to over two feet, and its course is regular except where diverted from its usual strike by a cross-vein.

Affiant has examined the Group tunnel, from its intersection with the Jumbo vein, herein mentioned, to its face, and has found no vein cut by said tunnel beyond said intersection, which in his opinion could form the prolongation of the vein now being developed in a northeasterly direction from the Jumbo cross-cut and from winze "A." The absence of such a vein, cut by the Group tunnel, the course of the drifts now being run from the Group tunnel in a southwesterly direction, and from the Jumbo cross-cut in a northeasterly direction, the character of the vein and the proximity of the faces of such drifts, convinces affiant, that if said drifts are prolonged, each following the vein, they will finally meet, proving the vein to be continuous from the Group tunnel to the Jumbo cross-cut.

The vein upon which appears to be located the Jumbo No. 2 Lode

mining claim, and which is herein mentioned as the Jumbo vein, is one of the best marked and most clearly defined vertical veins in the property examined, and is exceedingly persistent and definite, and in the opinion of this affiant is a separate and distinct vein from any other vein examined in said premises, having a general strike to the northeast and southwest, and having its apex at a considerable distance below the surface of the earth, said apex being immediately below the gray shale, hereinabove described.

Both vertical pay veins and cross-veins, when in their upward course they meet the black shale underlying the above-mentioned limestone, break up into stringers and pass through the black shale and limestone, or else pass unbroken through the limestone, without penetrating into the gray shale above. Where the walls of the veins have been faulted to a great
263 extent, the limestone stratum has also been completely dislocated, but the gray shale above, being usually of the consistency of damp clay, has yielded to the motion without showing any sign of fracture. Where, however, the walls of a vein have been faulted to a less extent, the limestone has followed the downward motion of one of the walls by merely bending on the downthrow side without losing its continuity. Thus, what below the black shale is a true fault fissure may develop into a fold without rupture in the limestone and be untraceable in the gray shale above. The ore which accompanies the veins follows the stringers through the black shale and limestone and spreads out on the apex of the vein between the limestone and the superincumbent gray shale, forming an ore-pipe of irregular width and thickness, which follows the trend of the fault fissure.

In the ground examined by the affiant, he has not found any ore body lying between the limestone and the gray shale, which is not directly connected with either a vertical or cross vein beneath.

He has observed, on the other hand, that the apex of a vertical or cross vein does not necessarily carry ore in, or on the upper surface of, the limestone, that the area of the ore pipes on or near said surface is small as compared with the total upper surface of the limestone, and that the space lying between those ore pipes is barren of ore.

HENRY HOBART KNOX.

[SEAL.] Subscribed and sworn to before me this 25th day of November, A. D. 1892.

CHARLES W. WATERMAN,
Notary Public.

My commission expires Nov. 26th, 1894.

Indorsed: 2827. U. S. circuit court. In chancery. The Rico-Aspen Consolidated Mining Co. *et al. vs.* The Enterprise Mining Co. Affidavit of Henry Hobart Knox for defendant. Filed Nov. 25, 1892. Robert Bailey, clerk.

264 UNITED STATES OF AMERICA, } ss:
District of Colorado, }

Affidavit of John B. Farish.

In the Circuit Court of the United States within and for said District.

THE RICO-ASPEN CONSOLIDATED MINING COMPANY *et al.*, Complainants,
vs.
THE ENTERPRISE MINING COMPANY, Defendant. } No. 2827.

STATE OF COLORADO, } ss:
County of Arapahoe, }

John B. Farish, being duly sworn, says: I am the person who made the affidavit of September 16th last heretofore filed in this suit, and I refer to said affidavit in connection with my present affidavit and statement.

I have read the joint affidavit of Messrs. Boehmer, Noble, Freeland, Page, Litchfield, Chase, Wiley, Murphy and Foster herein, made on the 2nd inst. When in February and March, 1891, I first visited the mining premises of the defendant company referred to in the affidavit of Mr. Boehmer and his associates, nearly all of the workings which had been made therein up to that time were open and were visited and carefully inspected by me. Since March, 1891, the greater part of the workings upon what is termed in the affidavit of said Boehmer and his associates as the zone of contact, have become inaccessible, and cannot now be inspected. From my knowledge of the said premises and which was acquired in the manner more fully set out in my September 16th, 1892, affidavit, I know, that there is not a continuous deposit of ore at the demarcation or "contact" between the limestone and the overlying shale; that in affiant's judgment such demarcation or "contact" does not in any sense constitute or correspond to a contact vein or deposit, and cannot be so considered after a full examination of the premises; and that the ore bodies found along such plane or line of demarcation are in fact the apices of fault-fissure veins cutting the strata of the mountain below this line of demarcation, as more fully explained in affiant's affidavit of September 16th last.

And affiant further says that he has read the affidavit of David Swickhimer, made October 28th last; that at the time affiant made the said examination of the said properties in February and March, 1891, nearly all of the openings upon what is referred to in the affidavit of Mr. Swickhimer as the contact, were open to
265 affiant's inspection, the only parts not accessible being those openings immediately adjoining the Enterprise shaft; that affiant made careful inspection and measurement of the cross-cuts, drifts and stopes, and was furnished with a map of all these underground drifts and cross-cuts made by E. W. Hunt, a civil engineer,

under the order of said Swickhimer, and that affiant further verified this survey by many measurements and courses taken by himself, and that those parts of the drifts on the so-called contact which were not accessible were taken from a map which had theretofore been prepared for Mr. David Swickhimer by said Hunt, and at a time when all parts of the mine were accessible, and that the result of such surveys, measurements, etc., are fully set forth on a map prepared at that time and which map affiant believes is now in New York, and that the workings made by said Swickhimer are shown with approximate accuracy on the accompanying map marked "Exhibit A," and which affiant believes was prepared from the original map before mentioned as having been made in March, 1891.

And affiant further says that the directions and distances given in said Swickhimer's affidavit as the direction and distances of drifts and stopes run by said Swickhimer upon the said so-called contact are approximately correct, but affiant says that the ore encountered and extracted in drifting to the northeast was found in two "pipes" following immediately over the Enterprise and Hiawatha veins respectively and that said pipes in affiant's judgment, from the apices of those veins; that in drifting to the southeast an ore body was followed for a long distance, which, after full investigation, affiant found was connected with and formed the apex of a certain cross-vein, shown upon the accompanying map, and designated cross-vein "D."

This apex ore body had been stoped by Mr. Swickhimer as far to the southeast as its junction with the Eureka vein, and in order to prove the correctness of affiant's belief, that the ore body was the apex of cross-vein "D," affiant caused certain upraises to be made from the Eureka cross-cut to the so-called contact and cross-cuts to be driven to the southwest to the apex of the cross-vein "D," at which point ore was encountered, proving conclusively that this body of ore followed immediately over the cross-vein "D" and was the top or apex of that vein.

Affiant further says that the drift referred to by said Swickhimer as having been run at least 200 feet to the west was in fact
266 run for about that distance to the southwest on the ore body following the top of and forming the apex of the Hiawatha vein. That the said Swickhimer had run and excavated numerous drifts and cross-cuts along and in the so-called contact in and by which no ore was disclosed and affiant says that the workings examined by him showed that the only ore which had been disclosed in the said so-called contact by the workings made by the said Swickhimer was found in connection with and constituting the tops or apices of fault-fissure veins belonging either to the vertical pay-vein system or to the cross-vein system, more fully described in affiant's September 16th, 1892, affidavit, and affiant further says that his inspection of the premises in February and March, 1891, disclosed to affiant the fact that the only ore taken out by said Swickhimer from the so-called contact had been taken out from the ore bodies or pipes constituting the tops or apices of the said fault-fissure veins. And affiant further says that while about 6 acres of the so-

called contact were developed by a network of drifts and stopes, as stated in said Swickhimer's affidavit, only those drifts and stopes run along the tops or apices of the fault-fissure veins disclosed any ore, and such drifts or workings as were not run along the tops or apices of the fault-fissure veins did not disclose ore, and in affiant's judgment these developments upon full investigation prove conclusively that the so-called contact is not mineralized, and that ore only occurs along the apices of the fault fissure veins.

JOHN B. FARISH.

[SEAL.] Subscribed and sworn to before me this 25th day of November, A. D. 1892.

CORNELIUS FERRIS, JR.,
Notary Public.

My commission expires Nov. 17, 1896.

(Here follows map marked page 267.)

268 & 269 Indorsed: No. 2827. In the circuit court. The Rico-Aspen Consolidated Mining Company, *et al.*, plaintiffs, *vs.* The Enterprise Mining Company, defendant. Affidavit of John B. Farish November 25th, 1892, for defendant. Filed Nov. 25, 1892. Robert Bailey, clerk. Charles H. Toll.

Tunnel Claim—Location Certificate.

STATE OF COLORADO, } ss:
County of Dolores, }

Know all men by these presents, that the undersigned citizens of the United States this 17th day of August, A. D. 1887, claim by right of location a tunnel claim known as the Group tunnel site for the purpose of discovering and working veins, lodes or deposits on the line thereof. Said tunnel claim is situated in the Pioneer mining district, county of Dolores, State of Colorado, and the location and bounds of said tunnel are staked on the surface at the place of commencement and described as follows: Va. 13° 50′ E. beginning at portal or face of tunnel whence the N. W. cor. sec. 36, T. 40, N. R. 11 W. of the N. M. P. M. bears N. 29° 30′ 57″ W. 4,024.0 ft., Elliott Mt. bears N. 27° 25′ W. Anchor Pk. bears N. 78° 13′ W. Thence S. 57° E. 75.4 ft. an aspen post marked Group tunnel site and 89.1 ft. + so marked because it is 89.1 ft. from point x which is a point 13.7 ft. N. 57° W. from face, 295.3 ft. an aspen post marked as before and 309.0 ft. 510.9 ft. an aspen post marked as before and 524.6 ft., 625.2 ft. an aspen post marked as before and 638.9 ft. whence cor. 4 sur. 434, bears S. 36° 51′ W. 131.4 ft. Storm Pk. bears S. 79° 30′ W., Elliott Pk. bears N. 28° 30′ W. 714.3 ft. an aspen post marked as before also 728.0 ft. whence cor. 4 sur. 436 A. bears S. 33° 23′ E. 300 ft. 1,124.9 ft. an aspen post marked as before and 1,138.6 ft. 1,203.7 ft. a spruce post marked as before and 1,217.4 ft. 1,480.1 ft. a spruce post marked as before and 1,493.8 ft. 1,698.8 ft. an aspen post marked as before and 1,712.5 ft. 1,917.7 ft. a spruce

post marked as before and 1,931.4 ft. 2,656.2 ft. a spruce post marked as before and 2,669.7 ft. whence a spruce tree 29″ dia. bears N. 57° W. 13.0 ft. 3,000 ft. a spruce post marked end of Group tunnel, whence Elliott Pk. bears N. 31° 12′ W. Anchor Pk. bears N. 72° W. a spruce tree 17″ dia. bears S. 26° 40′ W. 18.9 ft. Situated on west slope of Dolores Mt. about ¼ mi. S. E. of Rico.

Copy of Notice of Location.

Group tunnel site.

Know all men by these presents, that the undersigned hereby locate and claim this tunnel site beginning at this point and running S. 57° E. for a distance of 3,000 ft. and the right of pos-
270 session of 1,500 ft. in length and 300 ft. in width of all veins, lodes, ledges or mineral deposits along the line thereof that shall be discovered or intersected by this tunnel or any cross-cut therefrom. Size of tunnel 4 ft. by 6½ ft. high.

CHARLES NEWMAN.
W. L. STEPHENS.
MATTHEW T. CHESTNUT.

Dated this 25th day of July, A. D. 1887.

STATE OF COLORADO, } ss:
County of Dolores, }

Charles Newman being duly sworn on his oath deposes and says that he is a citizen of the United States and that he is one of the locators and owners of the Group tunnel site mentioned in the above and foregoing certificate of location thereof, that work was commenced on said tunnel on the 26th day of July, A. D. 1887, and cover entered the 3rd day of August 1887, that said date of commencement was ever since has been and is now his *bona fide* intention to prosecute work on said tunnel for the purpose of as expressed in foregoing certificate of prospecting for discovering and working all lodes, veins or deposits of mineral along the line of said tunnel. Affiants further says that in the prosecution of work on the said tunnel site since the commencement thereof they have expended more than $125.00.

CHARLES NEWMAN.

Subscribed and sworn to before me this 24th day of Aug. A. D. 1887.

[NOTARIAL SEAL.] CHARLES D. WRIGHT,
Notary Public.

Also M. T. Chestnut and Wm. L. Stephens by Charles Newman, att'y-in-fact, and agent for said M. T. Chestnut, and Wm. L. Stephens as co-owners in the within-mentioned "Group" tunnel site.

CHAS. NEWMAN.

Witness:
F. R. LEWIS.

STATE OF CALIFORNIA, } ss:
City and County of San Francisco, }

Wm. L. Stephens being duly sworn on his oath deposes and says that he is a citizen of the United States and that he is one of the locators and owners of the Group tunnel site mentioned in the above and foregoing certificate of location thereof, that work was commenced on said tunnel on the 26th day of July, A. D.
271 1887 and cover entered the 3rd day of August, A. D. 1887, that said date of commencement was ever since has been and is now his *bona fide* intention to prosecute work on said tunnel for the purpose of, as expressed in foregoing certificate of prospecting for discovering and working all lodes, veins or deposits of mineral along the line of said tunnel. Affiants further say- that in the prosecution of work on said tunnel site since the commencement thereof they have expended more than $125.00.

WM. L. STEPHENS.

[SEAL OF COURT.] Subscribed and sworn to before me this 31st day of August, A. D. 1887.

WM. REDDICK,
County Clerk and ex Officio Clerk of the Superior Court.

STATE OF MISSOURI, } ss:
State of St. Louis, }

Matthew T. Chestnut being duly sworn on his oath deposes and says that he is a citizen of the United States and that he is one of the locators and owners of the Group tunnel site mentioned in the above and foregoing certificate of location thereof, that work was commenced on said tunnel on the 26th day of July, A. D. 1887, and cover entered the 3rd day of August, A. D. 1887, that said date of commencement was ever since has been and is now his *bona fide* intention to prosecute work on said tunnel for the purpose of as expressed in foregoing certificate of prospecting for discovering and working all lodes, veins or deposits of mineral along the line of said tunnel. Affiants further says that in the prosecution of work on the said tunnel site since the commencement thereof they have expended more than $125.00.

MATTHEW T. CHESTNUT.

Subscribed and sworn to before me this 31st day of
[SEAL.] August, A. D. 1887.

JULIUS ROBERTSON,
A Commissioner for the State of Colorado, at St. Louis, Mo.

Indorsed: 2827. Copy. No. 6160. Location certificate of the Group tunnel site claim of Chas. Newman *et al.* in Pioneer mining district, Dolores county, Colorado. Filed May 23, 1893. Robert Bailey, clerk. State of Colorado, county of Dolores, *ss:* I hereby certify that this instrument was filed for record at 1.45 o'clock p. m. Aug. 29th, 1887, in my office and duly recorded in Book 11, page 140. F. R. Lewis, recorder. Charles H. Toll.

272 STATE OF COLORADO, } ss:
County of Dolores, }

Know all men by these presents, that the Enterprise Mining Company, the undersigned has this 15th day of June, 1892, located and claimed, and by these presents does locate and claim, by right of discovery and location, in compliance with the mining acts of Congress, approved May 10, 1872, and all subsequent acts, and with local customs, laws and regulations, 1,500 linear feet and horizontal measurement on the Jumbo No. 2 lode, vein, ledge or deposit, along the vein thereof, with all its dips, angles and variations, as allowed by law, together with 150 feet on the N. W. side, and 150 feet on the S. E. side of the middle of said vein at the surface, so far as can be determined from present developments; and all veins, lodes, ledges or deposits and surface ground within the lines of said claim, 54 feet running N. 54° 30′ E. from center of discovery point and 1,446 feet running S. 54° 30′ W. from center of discovery point: said discovery point being situate upon said lode, vein, ledge or deposit, and within the lines of said claim in the Group tunnel at a point 1,920 feet from the entrance thereof in Pioneer mining district, county of Dolores and State of Colorado, described by metes and bounds as follows, to wit:

Beginning at corner No. 1, a post and mound of stones, whence an aspen 10 ins. dia. bears S. 40° E. 3.5 ft. Expectation Mt. bears N. 67° 30′ W., Storm peak bears S. 85° 15′ W. and cor. No. 3 of sur. No. 780 Telegraph lode bears S. 16° 36′ W. 99.9 ft. Thence var. 13° 30′ E., N. 54° 30′ E. 77 ft. to N. W. side center stake, 1,500 ft. to cor. No. 2 a post and mound of stones which is also cor. No. 3 of sur. No. 6285 Eureka lode. Thence S. 35° 30′ E. 300 ft. to cor. No. 3 a post and mound of stones. Thence S. 54° 30′ W. 730 ft. to S. E. side center stake, 1,500 ft. to cor. No. 4 a post and mound of stones, whence an aspen stump 14 ins. dia. bears N. 16° E. 25 ft. Thence N. 35° 30′ W. 300 ft. to cor. No. 1, the place of beginning, containing 10.331 acres of surface ground. The location stake is placed on the surface at a point vertically over a duplicate location stake and notice placed in the Group tunnel at the point of discovery of the vein.

ENTERPRISE MINING COMPANY. [SEAL.]

Said lode was discovered on the 15th day of June, A. D. 1892.
Attest: E. H. HUNT, *Surveyor.*

Date of location survey July 14th, A. D. 1892.
Date of certificate, August 31st, A. D. 1892.

273 Indorsed: Copy. 2827. Location certificate. On the Jumbo No. 2 Lode mining claim of Enterpise Mining Company in Pioneer mining district, Dolores county, State of Colorado. State of Colorado, county of Dolores, *ss:* I hereby certify that this location certificate was filed for record in my office at 8.30 o'clock a. m., August 31st, 1892, and is duly recorded in Book 31, at page 121. F. R. Lewis, recorder. By A. H. Mundee, deputy. Fees $1.25. Filed May 23, 1893. Robert Bailey, clerk.

STATE OF COLORADO, } ss:
County of Dolores, }

I, F. R. Lewis, county clerk and recorder in and for said county, in the State aforesaid, do hereby certify the above and foregoing to be a full, true and correct copy of the location certificate of the Jumbo No. 2 Lode mining claim as appears upon the records of my office.

Given under my hand and official seal this 3d day of [SEAL.] September, A. D. 1892.

F. R. LEWIS,
County Clerk and Recorder,
By A. H. MUNDEE, *Deputy.*

STATE OF COLORADO, } ss:
County of Dolores, }

Know all men by these presents, that A. E. Arens, the undersigned, has this 2nd day of April, 1888, located and claimed, and by these presents do- locate and claim, by right of discovery and location, in compliance with the mining acts of Congress, approved May 10, 1872, and all subsequent acts, and with local customs, laws and regulations, 1,500 linear feet and horizontal measurement on the Vestal lode, vein, ledge or deposit, along the vein thereof, with all its dips, angles and variations, as allowed by law, together with 150 feet on the north side, and 150 feet on the south side of the middle of said vein at the surface, so far as can be determined from present developments, and all veins, lodes, ledges or deposits and surface ground within the lines of said claim, 10 feet running S. 61° 56′ E. from center of discovery cut and 1,490 feet running N. 61′ 56′ W. from center of discovery cut, said discovery cut being situate upon said lode, vein, ledge or deposit and within the lines of said claim in Pioneer mining district, county of Dolores and State of Colorado, described by metes and bounds as follows, to wit:

Beginning at corner No. 1 an aspen post whence an aspen tree 10″ dia. marked B. T. 1 bears E. 8 ft. Thence N. 28° 4′ S. 300 ft. to N. W. cor. No. 2, an aspen post whence Mt. Elliott bears
274 N. 27° 59′ W. Expectation Mt. bears N. 71° 20′ W. an aspen tree 1′ dia. marked B. T. 2 bears S. 17° 47′ W. 39.7 ft. Thence S. 61° 56′ E. 750 feet to N. S. center 1,500 ft. N. E. cor. No. 3 a spruce post whence a spruce tree 1′ dia. marked B. T. 3 bears No. 6 ft. Thence S. 28° 4′ W. 300 feet to S. E. cor. No. 4, a spruce post whence a spruce tree 16″ dia. marked B. T. 4 bears N. 30° E. 18 ft. Thence N. 61° 56′ W. 750 ft. to S. S. center 1,500 ft. to S. W. cor. No. 1 the place of beginning. Said claim is situate upon the west slope of Dolores Mt., about ⅝ mile from the town of Rico. Var. 14° E. Discovery work is at the point of location 10 ft. from the S. E. end of claim.

A. E. ARNES. [SEAL.]

Said lode was discovered on the 23d day of March, A. D. 1888. Attest: —— ——, *Locator.*

Date of location, April 2nd, A. D. 1888.
Date of certificate, April 2nd, A. D. 1888.

Indorsed: 2827. Location certificate. On the Vestal mining claim of A. E. Arnes in Pioneer mining district, Dolores county, State of Colorado. State of Colorado, county of Dolores, *ss:* I hereby certify that this location certificate was filed for record in my office at 9.30 o'clock a. m., April 3d, 1888, and is duly recorded in Book 21, at page 294. F. R. Lewis, recorder. Filed May 23, 1893. Robert Bailey, clerk.

STATE OF COLORADO, }
County of Dolores, } *ss:*

I, F. R. Lewis county clerk and recorder in and for said county in the State aforesaid, do hereby certify the above and foregoing to be a full, true and correct copy of the location certificate of the Vestal Lode mining claim as appears upon the records of my office.

Given under my hand and official seal this 6th day of
[SEAL.] September, A. D. 1892.

F. R. LEWIS,
County Clerk and Recorder.
By A. H. MUNDEE, *Deputy.*

STATE OF COLORADO, }
County of Dolores, } *ss:*

Know all men by these presents, that we, A. P. Adams and W. E. So Relle the undersigned have this 18th day of November, 1889, amended, located and claimed, and by these presents do
275 amend, locate and claim, by right of discovery and amended location in compliance with the mining acts of Congress, approved May 10th, 1872, and all subsequent acts, and with sec. 2409 of the General Laws of Colorado, and with local customs, laws and regulations, 1,500 linear feet and horizontal measurement on the Vestal lode, vein, ledge or deposit, along the vein thereof, with all its dips, angles and variations, as allowed by law, together with 150 feet on each side of the middle of said vein at the surface, so far as can be determined from present developments; and all veins, lodes, ledges or deposits and surface ground within the lines of said claim, 10 feet running southeasterly from center of discovery cut and 1,490 feet running northwesterly from center of discovery cut, said discovery cut being situate upon said lode, vein, ledge or deposit, and within the lines of said claim in Pioneer mining district, county of Dolores and State of Colorado, described by metes and bounds as follows, to wit:

Beginning at corner No. 1 being the N. W. corner whence a spruce tree 10 ins. dia. bears S. 43° 15′ E. 25.8 ft. cor. No. 16 sur. No. 5805 Hiawatha lode, bears N. 54° 09′ W. 339 ft. S. 61° 56′ E.

750 ft. to north side center stake, 1,500 ft. to corner No. 2 whence a spruce tree 18 ins. dia. bears N. 55° W. 8 ft. Thence S. 1° 18′ W. 336 ft. to cor. No. 3. Thence N. 61° 56′ W. 750 ft. to south side center stake 1,500 ft. to corner No. 4. Thence N. 1° 18′ E. 336 ft. to cor. No. 1, the place of the beginning. Va. 14° E. This claim is situate on the western slope of Dolores Mt. about 1 mile S. E. from the town of Rico. This being the same lode originally located on the 1st day of April, 1888, and recorded on the 3d day of April, 1888, in Book 21 page 294 in the office of the recorder of Dolores county, this further and amended certificate *or* location is made without waiver of any previously acquired rights, but for the purpose of correcting any errors in the original location, description or record.

A. P. ADAMS. [SEAL.]
W. E. SO RELLE. [SEAL.]

Said lode was discovered the 23d day of March, A. D. 1888.
Attest: —— ——, *Locator.*

Date of amended location, April 1st, A. D. 1888.
Date of amended certificate, Nov. 18th, A. D. 1889.

Indorsed: 2827. Amended location certificate. On the Vestal mining claim of A. P. Adams *et al.*, in Pioneer mining district, Dolores county, State of Colorado. State of Colorado, county of Dolores, *ss:* I hereby certify that this amended location cer-
276 tificate was filed for record in my office at 9.55 o'clock a. m., November 29th 1889 and is duly recorded in page 122 Book 26. F. R. Lewis, recorder. Filed May 23, 1893. Robert Bailey, clerk.

STATE OF COLORADO, } *ss:*
County of Dolores, }

I, F. R. Lewis, county clerk and recorder in and for said county in the State aforesaid, do hereby certify the above and foregoing to be a full, true and correct copy of the amended location certificate of the Vestal Lode mining claim as appears upon the records of my office.

Given under my hand and official seal this 6th day of
[SEAL.] September, A. D. 1892.

F. R. LEWIS,
County Clerk and Recorder,
By A. H. MUNDEE, *Deputy.*

STATE OF COLORADO, } *ss:*
County of Dolores, }

Know all men by these presents, that we, A. P. Adams and W. E. So Relle, the undersigned, have this 26th day of December, 1889, amended, located and claimed, and by these presents do amend, locate and claim, by right of discovery and amended location in compliance with the mining acts of Congress, approved May 10,

1872, and all subsequent acts, and with sec. 2409 of the General Laws of Colorado, and with local customs, laws and regulations, 1,500 linear feet and horizontal measurement on the Vestal lode, vein, ledge, or deposit, along the vein thereof, with all its dips, angles and variations, as allowed by law, together with 150 feet on each side of the middle of said vein at the surface, so far as can be determined from present developments; and all veins, lodes, ledges or deposits and surface ground within the lines of said claim, 1,490 feet running N. 61° 51′ W. from entrance of discovery cut and 10 feet running S. 61° 51′ E. from entrance of discovery cut, said discovery cut being situate upon said lode, vein, ledge or deposit, and within the lines of said claim in Pioneer mining district, county of Dolores and State of Colorado, described by metes and bounds as follows, to wit:

Beginning at corner No. 1 a post and mound of stones, whence an aspen stump 12 ins. dia. bears N. 44° 30′ W. 11 ft. Elliott Mt. bears N. 28° 10′ W. Expectation Mt. bears N. 71° 25′ W. and cor. No. 16 of sur. No. 5805 Hiawatha lode bears N. 66° 43′ W. 206 ft. Thence var. 13° 30′ E. S. 61° 56′ E. 1,500 ft. to cor. No. 2 a post and mound of stones, whence a spruce — 18 ins. dia. bears N. 55° W. 8 ft.
277 Thence S. 1° 18′ W. 336 ft. to cor. No. 3 a post and mound of stones, whence a spruce — 16 ins. dia. bears N. 11° 55′ E. 60.5 ft. Thence N. 61° 56′ W. 1,500 ft. to cor. No. 4 a post and mound of stones, whence an aspen 10 ins. dia. bears south 3 ft. Thence N. 1° 18′ E. 336 ft. to place of beginning. Containing 10.331 acres of surface ground. This being the same lode originally located on the 1st day of April, 1888, and recorded on the 3d day of April, 1888, in Book 21 page 294 in the office of the recorder of —— county, this further and amended certificate of location is made without waiver of any previously acquired rights, but for the purpose of correcting any errors in the original location, description or record, of which an amended location certificate was filed for record on the 29th day of November, A. D. 1889, and recorded in Book 26 page 122 of the records of said Dolores county, Colorado.

A. P. ADAMS. [SEAL.]
W. E. SO RELLE. [SEAL.]

Said lode was discovered on the 23d day of March, A. D. 1888.
Attest: —— ——.

Date of second amended location, December 26th, A. D. 1889.
Date of second amended certificate, December 28th, A. D. 1889.

Indorsed: 2827. Second amended location certificate. On the Vestal Lode mining claim of A. P. Adams *et al.*, in Pioneer mining district, Dolores county, State of Colorado. State of Colorado, county of Dolores, *ss:* I hereby certify that this amended location certificate was filed for record in my office, at 11.20 o'clock a. m., December 28, 1889, and is duly recorded in page — Book —. F. R. Lewis, recorder. Filed May 23, 1893. Robert Bailey, clerk.

STATE OF COLORADO, } ss:
County of Dolores, }

I, F. R. Lewis, county clerk and recorder in and for said county in the State aforesaid, do hereby certify the above and foregoing to be a full, true, and correct copy of the second amended location certificate of the Vestal Lode mining claim as appears upon the records of my office.

[SEAL.] Given under my hand and official seal this 26th day of August, A. D. 1892.

F. R. LEWIS,
County Clerk and Recorder,
By A. H. MUNDY, *Deputy.*

278 UNITED STATES OF AMERICA, } ss:
District of Colorado, }

Bill.

In the Circuit Court of the Eighth Judicial Circuit in and for said District.

THE RICO-ASPEN CONSOLIDATED MINING COMPANY *et al.*, Complainants,
vs.
THE ENTERPRISE MINING COMPANY, Defendant.

Cross-bill.

THE ENTERPRISE MINING COMPANY, Complainant,
vs.
THE RICO-ASPEN CONSOLIDATED MINING COMPANY *et al.*, Defendants.

This cause coming on to be heard upon the bill, answer and replication, together with the affidavits and documentary evidence in support thereof, and also upon the cross-bill, answer and replication, together with the evidence, affidavits, &c., presented by the several parties in support of their respective allegations, and the same having been argued by counsel and the court having fully considered the same and being fully advised in the premises, doth find the issues therein joined on said bill, answer and replication for the complainants, and that the equities of the bill are with the complainants.

It is, therefore, ordered, adjudged and decreed that the said defendant, its agents, attorneys, servants and employés and each and all of them be and they are hereby perpetually and forever enjoined and restrained from entering into or upon either the surface or underground territory of the said Vestal Lode mining claim or within the surface boundaries thereof extended downward vertically, or from breaking and destroying or removing therefrom any ore, or from removing therefrom any ore heretofore broken down, or from selling, shipping, removing, or receiving pay for any ore

heretofore broken down within said surface boundaries extended downward vertically of the said Vestal Lode mining claim described in said complaint, or from in anywise or manner interfering with the ownership, possession or enjoyment of said premises or any part thereof by the said complainants, or from making, setting up, asserting or claiming title thereto or to any part thereof or to the ores thereunto belonging by virtue of anything in the said answer contained, alleged or set forth.

It is further ordered, adjudged and decreed that the said plaintiffs are the owners in fee as against the said defendant and
279 entitled to the absolute and uninterrupted enjoyment and possession of the said Vestal lode mining claim and each and every part thereof as described in said complaint, and that said complainants do have and recover of and from the said defendants their costs and charges in the premises to be taxed.

And it is further ordered, adjudged and decreed that the said The Enterprise Mining Company, complainant in said cross-bill, take nothing by its said bill and that the same be dismissed at the costs of the said The Enterprise Mining Company.

And it is further ordered, adjudged and decreed that the temporary restraining order heretofore granted to the said The Enterprise Mining Company upon the said cross-bill be and the same is hereby dissolved and set aside, and that the application of the said Enterprise Mining Company for a temporary writ of injunction be and the same is hereby denied.

ALFRED D. THOMAS, *Judge.*

Dated May 22d, 1892.

Indorsed: 2827. Circuit court of the United States. Rico-Aspen Con. Min. Co. *vs.* Enterprise Min. Co. Decree. Filed May 22, 1893. Robert Bailey, clerk. Thomas, Bryant & Lee, att'ys for complainant.

18th Day, May Term.

MONDAY, *May 22d, A. D.* 1893.

Bill for an Injunction and for Other Relief.

THE RICO-ASPEN CONSOLIDATED MINING COMPANY *et al.*
vs.
THE ENTERPRISE MINING COMPANY.
} 2827. In Chancery.

At this day come the said complainants by C. S. Thomas, Esqr., their solicitor, and the said defendant by J. F. Vaile Esqr., its solicitor also comes.

And thereupon the said defendant prays an appeal from the decree of this court to the United States circuit court of appeals for the eighth judicial circuit, which is allowed, conditioned nevertheless, that the said defendant give bond upon said appeal in the sum of five hundred dollars ($500).

280 UNITED STATES OF AMERICA, } ss:
Eighth Circuit, }

No. 2827. In the Circuit Court of Appeals.

Appeal from the circuit court of the eighth judicial circuit in and for the district of Colorado.

Bill.

THE RICO-ASPEN CONSOLIDATED MINING COMPANY, a Corporation; David Swickhimer, Laura D. Swickhimer, A. P. Adams, John S. Green, John Kinkaid, A. O. Headley, Julius Thompson, and Frank W. Ingersoll, Complainants,
vs.
THE ENTERPRISE MINING COMPANY, Defendant.

Cross-bill.

THE ENTERPRISE MINING COMPANY, Cross-complainant,
vs.
THE RICO-ASPEN CONSOLIDATED MINING COMPANY, a Corporation; David Swickhimer, Laura D. Swickhimer, A. P. Adams, John S. Green, John Kinkaid, A. O. Headley, Julius Thompson, and Frank W. Ingersoll, Defendants to Cross-bill.

Comes now the appellant, The Enterprise Mining Company, defendant to the original bill in the above-entitled cause, and cross-complain-t in said cause, and says, that there was manifest error in the proceedings, findings and decree of the court below, in this, to wit:

1. The court erred in holding that the Vestal Lode mining claim was located in the year 1879, and that said location was older in date than the location of the Group tunnel site.

2. The court erred in holding, in effect, that Congress did not intend to fix the length of a location, made upon a discovery in a tunnel, and that the matter is subject to local regulation.

3. The court erred in holding that the words of section 2323 of the Revised Statutes of the United States, "to the same extent as if discovered from the surface," mean only that the location shall be as good as upon a discovery from the surface.

4. The court erred in holding that, in a case of a location from a discovery in a tunnel, it is as necessary to mark the boundaries upon the surface, and file a certificate for record, as in other cases.

281 5. The court erred in holding that, while a discovery in a tunnel suffices for the usual work on the surface, such as a shaft, adit or other opening to the lode, "all other things must be done as in the case of an ordinary location on the surface."

6. The court erred in holding that, under section 2323 of the Revised Statutes of the United States, and without local regulation, as to the length of a claim founded on a discovery in a tunnel, nothing would pass but the line of the tunnel itself.

7. The court erred in holding that the act of 1861, of the Territory of Colorado, providing that a tunnel locator should have 250 feet each way from the tunnel, on all lodes discovered in the tunnel, is still in force.

8. The court erred in holding that the act of 1861, of the Territory of Colorado, providing that a tunnel locator should have 250 feet each way from the tunnel, on all lodes discovered in the tunnel, is a limitation upon the rights of the appellant under its ownership of the Group tunnel site.

9. The court erred in holding that appellant's Jumbo No. 2 Lode mining claim does not extend into the Vestal territory.

10. The court erred in finding the issues joined on the bill, answer and replication, for the complainants, and that the equities of the bill were with the plaintiffs.

11. The court erred in rendering final decree for the plaintiffs, appellees herein.

12. The court erred in rendering decree against the appellant, the cross-complainant, upon its cross-bill.

13. The court erred in adjudging and decreeing, that the defendant, (appellant,) its agents, attorneys, servants and employés, should be perpetually enjoined and restrained from entering into or upon either the surface or underground territory of the Vestal Lode mining claim, or within the surface boundaries thereof extended downward vertically.

14. The court erred in ordering, adjudging and decreeing, that the defendant (appellant), its agents, attorneys, servants and employés be perpetually enjoined and restrained from breaking down or removing from said Vestal Lode mining claim any ore, or from removing therefrom any of the ore theretofore broken down, or from selling, shipping, removing or receiving pay for any ore theretofore broken down, within the surface boundaries, extended downward vertically, of the Vestal Lode mining claim, described in the complaint.

282 15. That the court erred in ordering, adjudging and decreeing, that the defendant (appellant), its agents, attorneys, servants and employés be perpetually enjoined and restrained from interfering with the ownership, possession or enjoyment of the said Vestal Lode mining claim, or any part thereof, by the complainants, or from making, setting up, asserting or claiming title thereto, or to any part thereof, or to the ores thereunto belonging.

16. The court erred in ordering, adjudging and decreeing that the plaintiffs, appellees, are the owners in fee, as against the said defendant (appellant), and entitled to the absolute and uninterrupted enjoyment and possession of the Vestal Lode mining claim, and each and every part thereof, as described in the complaint.

17. The court erred in adjudging that the complainants have and recover, of and from the defendants, their costs and charges.

18. The court erred in adjudging and decreeing that the temporary restraining order, granted to the said The Enterprise Mining Company, appellant, upon its cross-bill, be dissolved, and set aside, and

that the application of the said The Enterprise Mining Company, for a temporary writ or injunction be denied.

For which errors, the appellant (defendant and cross-complainant) prays that the decree of the court below be in all things reversed, and that the appellant have such further relief in the premises, as to the court shall seem just.

H. M. TELLER,
CHAS. H. TOLL,
EDWARD O. WOLCOTT,
JOEL F. VAILE,
Solicitors for Appellant.

Indorsed: No. 2827. In the circuit court of appeals. The Rico-Aspen Consolidated Mining Company, a corporation, *et al.*, complainants, *vs.* The Enterprise Mining Company *et al.*, defendant. The Enterprise Mining Company, cross-complainant, *vs.* The Rico-Aspen Consolidated Mining Company, a corporation, *et al.*, def'ts, to cross-bill. Bill. Cross-bill. Assignment of errors. Filed May 22, 1893. Robert Bailey, clerk. Wolcott & Vaile, solicitors for def't.

THE UNITED STATES OF AMERICA, }
District of Colorado. }

Know all men by these presents, that we, The Enterprise Mining Company are held and firmly bound unto the Rico-Aspen
283 Consolidated Mining Company, David Swickhimer, Laura D. Swickhimer, A. P. Adams, John S. Green, John Kinkaid, A. O. Headley, Julius Thompson and Frank W. Ingersoll in the full and just sum of five hundred (500) dollars, to be paid to the said The Rico-Aspen Consolidated Mining Company, David Swickhimer, Laura D. Swickhimer, A. P. Adams, John S. Green, John Kinkaid, A. O. Headly, Julius Thompson and Frank W. Ingersoll, their successors, heirs, executors, administrators or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 26th day of May, in the year of our Lord one thousand eight hundred and ninety-three.

Whereas lately at the May term, A. D. 1893, of the circuit court of the United States, for the district of Colorado, in a suit pending in said court between The Rico-Aspen Consolidated Mining Company, David Swickhimer, Laura D. Swickhimer, A. P. Adams, John S. Green, John Kinkaid, A. O. Headley, Julius Thompson, and Frank W. Ingersoll, plaintiffs, and The Enterprise Mining Company, defendant, decree was rendered against the said The Enterprise Mining Company and the said The Enterprise Mining Company having prayed and been allowed an appeal from said decree to the United States circuit court of appeals for the eighth circuit and a citation directed to the said The Rico-Aspen Consolidated Mining Company, David Swickhimer, Laura D. Swickhimer, A. P. Adams, John S. Green, John Kinkaid, A. O. Headley, Julius Thompson, and Frank W. Ingersoll citing and admonishing them to be

and appear in the United States circuit court of appeals for the eighth circuit, at the city of St. Louis, Missouri, sixty days from and after the date of said citation:

Now, the condition of the above obligation is such, that if the said The Enterprise Mining Company shall prosecute said appeal to effect, and answer all damages and costs if it fail to make good its plea, then the above obligation to be void, else to remain in full force and virtue.

THE ENTERPRISE MINING COMPANY, [SEAL.]
By GEORGE CRAWFORD, [SEAL.]
Its Secretary.
GEORGE CRAWFORD. [SEAL.]
JOHN L. McNEIL. [SEAL.]
M. E. SMITH. [SEAL.]

Sealed and delivered in presence of—

A. G. THOMPSON.

Approved:

ALFRED D. THOMAS, *Judge.*

284 *Justification.*

THE UNITED STATES OF AMERICA, } ss:
District of Colorado, }

John L. McNeil and Michael E. Smith sureties on the within bond, being each first duly sworn, deposes and saith that he is worth in property in the State of Colorado not exempt from execution the sum below set opposite his name, that is to say:

As to John L. McNeil, one thousand (1,000) dollars.
As to Michael E. Smith, one thousand (1,000) dollars.

over and above all his just debts and liabilities, and in property subject to levy and sale upon execution.

JOHN L. McNEIL.
M. E. SMITH.

[SEAL.] Subscribed and sworn to before me, at Denver, this 29th day of May, A. D. 189–.

CORNELIUS FERRIS, JR.,
Notary Public.

My commission expires Nov. 17, 1893.

Indorsed: Gen. No., 2827. Circuit court of the United States, district of Colorado. The Rico-Aspen Consolidated Mining Company *et al.*, *vs.* The Enterprise Mining Company. Bond on appeal. $500. Filed this 31st day of May, A. D. 1893. Robert Bailey, clerk.

UNITED STATES OF AMERICA, }
State of Colorado, County of Arapahoe, } ss:

Arthur Ponsford, being duly sworn, says that he is over the age of 21 years and not a party to nor interested in the within-entitled cause; he further says that on the 13th day of November, 1893, he served the annexed citation upon the Rico-Aspen Consolidated Mining Company, a corporation, and one of the parties within mentioned as appellees, by delivering and leaving with Francis T. Osgood, an officer of said corporation, to wit, its assistant secretary, a true copy thereof, such service being made in the city of Denver, State of Colorado.

Deponent further says that on said 13th day of November he served the annexed citation upon David Swickhimer and A. P. Adams, two of the appellees therein named, by delivering
285 and leaving with each of said appellees, viz: David Swickhimer and A. P. Adams, at the city of Denver and State of Colorado, a true copy of said citation.

ARTHUR PONSFORD.

Subscribed and sworn to before me this 13th day of November, 1893.

[Seal Cornelius Ferris, Jr., Notary Public, Arapahoe County, Colo.]

CORNELIUS FERRIS, JR.,
Notary Public.

My commission expires Nov. 17th, 1896.

UNITED STATES OF AMERICA, }
District of Colorado. }

Citation.

United States Circuit Court of Appeals.

The United States of America to the Rico-Aspen Consolidated Mining Company, David Swickhimer, A. P. Adams, John S. Green, John Kinkaid, A. O. Headley, Julius Thompson, & Frank W. Ingersoll, Greeting:

You are hereby cited and admonished to be and appear, in the United States circuit court of appeals, for the eighth circuit, at the city of St. Louis, Missouri, sixty days from and after the day this citation bears date, pursuant to an appeal filed in the clerk's office of the circuit court of the United States, for the district of Colorado, sitting at Denver, in said district, wherein The Enterprise Mining Company is appellant & you are appellees, to show cause if any there be, why the judgment rendered against the said plaintiff in error, as in the said appeal mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Honorable Moses Hallett, judge of the cir. court of the United States for the district of Colorado, this 11th day of

November, in the year of our Lord one thousand eight hundred and ninety-three.

MOSES HALLETT,
Judge of Circuit Court.

Received copy of the within citation, Denver, Nov. 11, 1893.
C. J. HUGHES, JR.,
Solicitor for Plaintiff.

Due service of the within citation is admitted this 11th day of November, 1893.

——— ———,
Solicitor for Appellees.

286 Gen. No. 2827. United States circuit court of appeals, eighth circuit. Enterprise Mining Co., appellant, *vs.* Rico-Aspen Con. Min. Co. *et al.*, appellees. Citation. Filed in United States circuit court for the district of Colorado, this 15th day of November, A. D. 1893. Robert Bailey, clerk.

UNITED STATES OF AMERICA, }
District of Colorado, } *ss:*

I, Robert Bailey, clerk of the circuit court of the United States for the district of Colorado, do hereby certify the above and foregoing to be a true, perfect and complete transcript and copy of the record and proceedings and of all thereof heretofore filed or had and entered of record in said court, and in a certain cause lately in said court pending, wherein The Rico-Aspen Consolidated Mining Company, David Swickheimer, Laura D. Swickhimer, A. P. Adams, Washington S. Green, John Kinkaid, A. D. Hedley, Juiius Thompson and Frank W. Ingersoll were complainants and The Enterprise Mining Company was respondent, as fully and completely as the same still remain on file or of record in my office, at Denver.

Seal of United States Circuit Court, District of Colorado.

In testimony to the above, I do hereunto sign my name and affix the seal of said court, at Denver, in said district, this 16th day of November A. D. 1893.

ROBERT BAILEY, *Clerk.*

Filed Jan. 10, 1894. John D. Jordan, clerk.

287 *Appearance of Mr. Hughes for Appellees.*

And on the twenty-ninth day of January A. D. 1894, an appearance of counsel for appellees was filed in the clerk's office of said circuit court of appeals in words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit, May Term, 1894.

ENTERPRISE MINING COMPANY, Appellant,
vs.
THE RICO-ASPEN CONSOLIDATED MINING COMPANY. } No. 390.

The clerk will enter my appearance as counsel for the appellee-.
CHARLES J. HUGHES, JR.

Endorsed: U. S. circuit court of appeals, eighth circuit, May term, 1894. No. 390. Enterprise Mining Company, appellant, *vs.* Rico-Aspen Consolidated Mining Co. Appearance. Filed Jan. 29, 1894. John D. Jordan, clerk. Charles J. Hughes, Jr., counsel for appellee-.

Appearance for Appellant.

And on the nineteenth day of February, A. D. 1894, an appearance of counsel for appellant was filed in the clerk's office of said circuit court of appeals in words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit, May Term, 1894.

ENTERPRISE MINING COMPANY, Appellant,
vs.
THE RICO-ASPEN CONSOLIDATED MINING CO. } No. 390.

The clerk will enter my appearance as counsel for the appellant.
JOEL F. VAILE.
CHARLES H. TOLL.

Endorsed: U. S. circuit court of appeals, eighth circuit, May term, 1894. No. 390. Enterprise Mining Co., appellant, *vs.*
288 Rico-Aspen Consolidated Mining Company. Appearance. Filed Feb. 19, 1894. John D. Jordan, clerk. Joel F. Vaile, Charles H. Toll, Denver, Col., counsel for appellant.

Appearance of Mr. C. S. Thomas for Appellees.

And on the twenty-eighth day of April, A. D. 1894, an appearance of Mr. C. S. Thomas, counsel for appellees, was filed in the clerk's office of said circuit court of appeals in words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit, May Term, 1894.

ENTERPRISE MINING COMPANY, Appellant,
vs.
RICO-ASPEN CONSOLIDATED MINING COMPANY. } No. 390.

The clerk will enter my appearance as counsel for the appellee-.
C. S. THOMAS.

Endorsed: U. S. circuit court of appeals, eighth circuit, May term, 1894. No. 390. Enterprise Mining Co., appellant, *vs.* Rico-Aspen Consolidated Mining Co. Appearance. Filed Apr. 28, 1894. John D. Jordan, clerk. C. S. Thomas, counsel for appellee-.

Appearance of R. S. Morrison for Appellee-.

And on the thirty-first day of August, A. D. 1894, an appearance of Mr. R. S. Morrison, counsel for appellees, was filed in the clerk's office of said circuit court of appeals in words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit, May Term, 1894.

THE ENTERPRISE MINING COMPANY, Appellant,
vs.
THE RICO-ASPEN CONSOLIDATED MINING CO. *et al.* } No. 390.

289 The clerk will enter my appearance as counsel for the appellees.

R. S. MORRISON,
504 *Eq. B'd'g, Denver.*

Endorsed: U. S. circuit court of appeals, eighth circuit, May term, 1894. No. 390. The Enterprise Mining Co., appellant, *vs.* The Rico-Aspen Consolidated Mining Co. *et al.* Appearance. Filed Aug. 31, 1894. John D. Jordan, clerk. R. S. Morrison, counsel for appellees.

Argument Commenced.

And on the eighth day of January, A. D. 1895, in the record of the proceedings of said circuit court of appeals is an entry in said cause in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1894.

THE ENTERPRISE MINING COMPANY, Appellant,
vs.
THE RICO-ASPEN CONSOLIDATED MINING COMPANY *et al.*, Appellees. } No. 390.

Appeal from the circuit court of the United States for the District of Colorado.

TUESDAY, *January* 8, 1895.

This case having been passed and called for hearing this day, on motion, one-half hour additional time was granted to each party for the argument thereof. Thereupon argument was commenced by Mr. Charles H. Toll, in behalf of appellant, and continued by Mr. C. S. Thomas, for appellees, and, the hour of adjournment having arrived, further argument was postponed until tomorrow morning.

Cause Submitted.

290 And on the ninth day of January, A. D. 1895, in the record of the proceedings of said circuit court of appeals is an order of submission of said cause in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1894.

THE ENTERPRISE MINING COMPANY, Appellant,
vs.
THE RICO-ASPEN CONSOLIDATED MINING COMPANY *et al.*, Appellees. } No. 390.

Appeal from the circuit court of the United States for the district of Colorado.

WEDNESDAY, *January* 9, 1895.

This cause having been called this day for further hearing, argument was continued by Mr. C. S. Thomas and Mr. Charles J. Hughes, Jr., in behalf of appellees, and concluded by Mr. Joel F. Vaile, for appellant.

Thereupon this cause was submitted to the court upon the transcript of record from said circuit court and the briefs of counsel filed herein.

Opinion.

And on the twenty-third day of February, A. D. 1895, an opinion of said United States circuit court of appeals was filed in said cause in the following words, to wit:

291 United States Circuit Court of Appeals, Eighth Circuit, December Term, A. D. 1894.

THE ENTERPRISE MINING COMPANY, Appellant,
vs.
THE RICO-ASPEN CONSOLIDATED MINING Company, David Swickhimer, A. P. Adams, John S. Green, John Kinkaid, A. O. Headley, Julius Thompson, and Frank W. Ingersoll, Appellees. } No. 390. Appeal from the Circuit Court of the United States for the District of Colorado.

Syllabus.

1. Tunnel mining claims.—From the time of the location and commencement of his tunnel, under section 4 of the act of May 10, 1872 (sec. 2323, Rev. Stat.), the owner has the inchoate right to the possession of every blind vein or lode within

three thousand feet from the face of such tunnel on the line thereof that was not known to exist when the tunnel was located and commenced, contingent only upon the diligent prosecution of the work on the tunnel and the subsequent discovery of the vein or lode therein.

2. Subsequent discovery from surface.—No discovery or location of such veins or lodes from the surface subsequent to the location and commencement of the tunnel can deprive the owner of the tunnel claim who diligently prosecutes his work therein of these rights.

3. Extent of claim.—Upon the discovery of such a vein in the tunnel while the work upon it is being prosecuted with reasonable diligence such owner is entitled to the possession of such lode or vein to the same extent along the lode or vein as if discovered from the surface.

He is entitled to the possession of any fifteen hundred feet in continuous length along such lode or vein which includes his point of discovery in the tunnel.

292 The limitation of the extent of the right of the owner of a tunnel claim to the veins discovered therein to two hundred and fifty feet each way from the tunnel imposed by section 5 of the act passed by the Colorado legislature in 1861 (Session Laws of Colorado, 1861, p. 166; Mills' Annotated Statutes, sec. 3141) was removed by the act of Congress of May 10, 1872 (17 Stat. c. 152, p. 92), and the act of the legislature of Colorado of 1874. (Session Laws of Colorado, pp. 185, 187, 190; Mills' Annotated Statutes, sec. 3148.)

4. Adverse claim—Estoppel.—It is the duty of the owner of the tunnel claim to present and litigate his adverse claim to any such blind vein or lode that has been discovered and is known to exist within the mining claim located from the surface when the owners of the latter make application for their patent under sections 6 and 7 of said act (secs. 2325 and 2326, Rev. Stat.), and if, in the absence of fraud or mistake, he fails to do so, his rights as against such claimants will be lost.

When, however, the blind lode or vein is not known to exist and has not been discovered when the application for a patent is made and the claim of the locators from the surface lies parallel to the line of the tunnel, these sections of the act have no application, because it is impossible, in such a case, to fairly litigate the contingent inchoate right of the owner of the tunnel, and he will not be estopped by his failure to present an adverse claim.

Mr. Charles H. Toll and Mr. Joel F. Vaile (Mr. Henry M. Teller, Mr. Edward O. Wolcott and Mr. Adair Wilson were with him on the brief) for appellant.

Mr. Charles J. Hughes, Jr., and Mr. C. S. Thomas (Mr. R. S. Morrison was with them on the brief) for appellees.

Before Caldwell, Sanborn and Thayer, circuit judges.

Statement.

The appellant, The Enterprise Mining Company, a corporation, is the owner of the "Group tunnel," a tunnel mining claim under section 4 of the "act to promote the development of the mining resources of the United States," of May 10, 1872 (17 Stat. c. 152, p. 93; Revised Statutes, sec. 2323). It discovered a blind vein in this tunnel which was not known to exist when the tunnel site was located or when the excavation of the tunnel was commenced. This vein is called the Jumbo No. 2 vein, and it crosses one corner of the Vestal Lode mining claim, which is based on a dis-
293 covery from the surface subsequent to the commencement of the tunnel, and is owned by the appellees, The Rico-Aspen Consolidated Mining Company, a corporation, and its associates. The controversy in this case is over ore in this Jumbo No. 2 vein within the limits of the Vestal claim. The appellees filed a bill to enjoin the Enterprise Company from removing it, and the Enterprise Company answered and filed a cross-bill praying for like relief against the Aspen Company. On the final hearing the court below dismissed the cross-bill and entered a decree for the relief sought by the original bill. The appeal is from this decree.

This decree was rendered on the theory that the Enterprise Company could not maintain its claim to the ore here in question if the allegations of its pleadings were conceded to be true. The decree, therefore, has the effect of a decision sustaining a demurrer to the pleadings of the appellant. Enterprise Mining Company *v.* Rico-Aspen Consolidated Mining Company, 53 Fed. Rep., 321. It may be that upon a subsequent trial of the issues of fact in this case the court below or the jury to which it may remit these issues will find them otherwise than as we assume them to be in the decision of this case. It is not intended to determine such issues here. We must consider the case on the assumption that the allegations of the pleadings of the appellant are true. Upon this assumption the facts material to the decision of the questions presented by this record are these:

The course of the tunnel is from northwest to southeast. The Vestal Lode claim lies nearly parallel to the line of the tunnel, but its nearest corner is more than three hundred feet distant from the tunnel and is about fifteen hundred feet southeasterly of a line drawn across the face of the tunnel at right angles to its course. The general course of the Jumbo No. 2 vein is nearly at right angles to the line of the tunnel, and after it crosses the Vestal claim, it extends into the Jumbo Lode mining claim, which is owned by the appellant. The relative location of the tunnel and Jumbo No. 2 vein and the Vestal and Jumbo Lode mining claims appears from the accompanying plat:

(Here follows map marked page 294.)

295 In July, 1887, the line of the Group tunnel was duly located and the work of excavation commenced. When it had been excavated four hundred feet and in April, 1888, the Vestal Lode mining claim was first located. This claim is fifteen hundred feet long and three hundred feet wide. In April, 1890, application was made by the owners of this claim for a patent, and it was entered at the land office June 30, 1890, and was patented February 6, 1892. At the time of its entry at the land office no discovery of the Jumbo No. 2 vein had been made and the breast of the tunnel was seven hundred and fifty feet distant from the nearest portion of the Vestal claim. No vein or lode which extended in such a cross as to cross the end lines of the Vestal claim could cross the line of the tunnel without a radical change of its course. The Jumbo No. 2 vein does not appear at the surface of the earth, and it was first discovered in the Jumbo Lode mining claim September 1, 1891, at a distance of at least eight hundred feet from the line of the tunnel. At the time of this discovery the tunnel had been excavated about fifteen hundred feet. After this discovery the excavation of the tunnel was pressed forward in expectation of finding this vein in it, and on June 15, 1892, when the tunnel had been excavated nineteen hundred and twenty feet from its portal, this vein was discovered therein. Immediately upon the discovery of the vein, the Enterprise Company caused the boundaries of the claim, fifteen hundred feet long and three hundred feet wide, to be marked upon the surface of the earth, and caused a certificate of location to be duly recorded in which it claimed fifty-four feet along the vein to the northeasterly of the tunnel and fourteen hundred and forty-six feet southwesterly thereof. This claim is called Jumbo No. 2 on the plat. That portion of this vein within the limits of the Vestal claim is about seven hundred and fifty feet from the line of the tunnel.

SANBORN, *J.*, after stating the facts as above, delivered the opinion of the court:

Three questions are presented by this case.

1. Are the owners of a valid tunnel mining claim under section 4 of the act to promote mining of May 10, 1872 (17 Stat., c. 152, p. 92; sec. 2323 Revised Statutes), who have discovered a blind vein in their tunnel and have duly located and claimed it, entitled, as against the owners of a lode mining claim located from the surface after the location of the tunnel site, but before the discovery of the vein in the tunnel, to the possession of the vein or lode thus discovered, when such vein was not known to exist prior to the location of the tunnel but was first discovered in another lode mining claim before its discovery in the tunnel?

2. Are the owners of a tunnel mining claim estopped to maintain their right to a blind vein discovered in their tunnel after a junior lode mining claim discovered from the surface is patented, because, at a time when such blind vein had not been discovered and was not known to exist, they permitted a patent to issue for such
296 claim, which lay more than three hundred feet distant from the line of their tunnel and nearly parallel to it, without

making any adverse claim, under section 6 of the act of May 10, 1872, now section 2325 Revised Statutes?

3. If the owners of a tunnel mining claim are entitled to the possession of any portion of such a vein, to what extent are they entitled to it?

The answers to these questions depend chiefly, if not altogether, upon section 4 of the act of May 10, 1872, now section 2323 Revised Statutes, which reads as follows:

"Where a tunnel is run for the development of a vein or lode, or for the discovery of mines, the owners of such tunnel shall have the right of possession of all veins or lodes within three thousand feet from the face of such tunnel on the line thereof, not previously known to exist, discovered in such tunnel, to the same extent as if discovered from the surface; and locations on the line of such tunnel of veins or lodes not appearing on the surface, made by other parties after the commencement of the tunnel, and while the same is being prosecuted with reasonable diligence, shall be invalid; but failure to prosecute the work on the tunnel for six months shall be considered as an abandonment of the right to all undiscovered veins on the line of such tunnel."

The striking characteristic of this section of the act is, that it gives the right to the possession of certain veins or lodes to the diligent owner of a tunnel before his discovery or location of any lode or vein whatever, contingent only upon his subsequent discovery of such veins in his tunnel. Veins or lodes discovered on the surface or exposed by shafts from the surface must be found before any right to them vests (secs. 2, 5, act of May 10, 1872; secs. 2320, 2324 Rev. Stat.); but this section declares that the owners of a tunnel by simply locating and diligently prosecuting it, without the discovery of any vein or lode whatever, "shall have the right of possession of all veins or lodes within three thousand feet from the face of such tunnel on the line thereof, not previously known to exist, discovered in such tunnel, to the same extent as if discovered from the surface."

It is contended that the clause "to the same extent as if discovered from the surface" means that upon a discovery in the tunnel the extent of the benefit conferred is to be measured by the other provisions of the law concerning surface locations. But this section itself demolishes this contention. The right to the possession of a vein discovered from the surface would not antedate the discovery, but this section unquestionably gives such inchoate right to the owner of a tunnel before the discovery of any vein or lode. Again, a prior surface location of such a vein on the line of the tunnel after the commencement thereof would not be invalid against a discovery from the surface, but this statute declares that such locations shall be invalid as against the rights of the owner of the tunnel who subsequently discovers the vein therein. This section of the statute then, and not the provisions of the law relative to surface locations, must be taken to be the measure of the
297 right and title to a vein which the owner of a tunnel acquires by its discovery, and it certainly gives him a far greater and

more valuable right than is granted to a prospector upon the surface. The clause "to the same extent as if discovered from the surface" is evidently used in its natural, customary sense, and it measures the extent, the distance along the lode or vein, to which the right of possession given by the statute extends, and not the general benefits conferred by the discovery. Ellet *v.* Campbell (Colo.), 33 Pac. Rep. 521, 526.

It is argued that the owner of a tunnel acquires no right to a vein which he finds in his tunnel, when such vein has been discovered from the surface after the location and commencement of the tunnel and before the discovery of the vein therein, because in such a case the vein was "previously known to exist" when it was found in the tunnel, and hence was not discovered therein. But discoveries from the surface are prerequisites to locations based thereon, and yet this statute makes such locations of veins on the line of the tunnel made by other parties than its owners after its commencement void as against such owners. Thus the statute itself declares that the subsequent discovery and location shall not deprive the owners of the tunnel of their right to the possession of the veins guaranteed to them by the statute if they afterwards find them in the tunnel—much less can discovery without location have such an effect. From this provision of the statute and the context in which this clause appears, it is clear that the words "not previously known to exist" refer to the time of the location and commencement of the tunnel and not to the respective times of the discoveries of the various veins in the tunnel. It is the right to the possession of veins not known to exist before the owners of the tunnel located and commenced to excavate it, that is secured to them by this statute if they subsequently find them in their tunnel, and not the right to those only that were not known to exist when they reached them in the tunnel.

Nor can the position that the appellant here acquired no right to the vein in controversy because its discovery in the tunnel was not upon unappropriated public land be successfully maintained. This position rests entirely upon the claim that the place in the tunnel where the vein was discovered had been appropriated by the Hiawatha Lode mining claim. That claim extends diagonally across the line of the tunnel and had been located from the surface after the commencement of the tunnel. It was then located on the line of the tunnel and was invalid as against the owner of the tunnel by the express terms of the section we are considering. No appropriation of the public land on the line of this tunnel that would deprive the owner of his right to discover and possess this vein could be effected by a discovery and location from the surface after the location and commencement of the tunnel in the face of the express declaration of this section that such a surface location shall be void.

The argument in which counsel for appellees seem to have the most confidence, however, is, that a general view of the acts of Congress relative to mining shows that the policy of the United
298 States is to restrict the amount of the public lands that may be reserved or acquired for mining purposes to small tracts,

often not exceeding fifteen hundred feet in length and six hundred feet or less in width, as in lode claims located from the surface (sec. 2, act of May 10, 1872, sec. 2320 Rev. Stat.), that if the claim of the appellant that it is entitled to fifteen hundred feet in length of every vein or lode it discovers in its tunnel is sustained, a tunnel-owner may by locating and lazily prosecuting a tunnel, practically reserve from development and monopolize a tract of land three thousand feet long and three thousand feet wide, and that such a reservation would be against public policy and cannot have been the intention of Congress in the enactment of this section. It must be borne in mind, however, that it is only the right to veins that strike the line of the tunnel, and only such of those veins as are discovered in the tunnel that the owner gains any inchoate right to the possession of, if this claim of the appellant is sustained. Others may discover and hold all veins within fifteen hundred feet of the line of the tunnel that do not strike or cross its line and all that do strike it that are not discovered in it. Nor can the owner of such a tunnel preserve his rights to undiscovered veins by lazy and perfunctory work. It is true that this section four provides that he shall be deemed to have abandoned his rights to undiscovered veins if he fails to prosecute the work on his tunnel for six months, but it also provides that he cannot preserve these rights against subsequent prospectors and locators unless he prosecutes the work upon his tunnel with reasonable diligence. There is a wide margin between the line of abandonment and that of reasonable diligence, and we have no doubt that the courts will so apply the rule of diligence under this section that the prompt and energetic prosecutor of a tunnel will receive the just rewards the act of Congress guarantees to his diligence, while the slothful and negligent will not be permitted to deprive other prospectors of the rights or privileges the act secures to them.

There is no tenable middle ground under this section between a holding that the diligent owner of a tunnel is entitled to the possession of all the blind veins he discovers in his tunnel to the same extent along the veins as if he had discovered them at the surface, and a holding that by the discoveries and locations of others, subsequent to the commencement of his tunnel and before it reaches the veins at all, he may be deprived of every portion of them, except possibly the small segments within the bore of the tunnel. The latter view seems to have been adopted in The Corning Tunnel Co. *v.* Pell, 4 Colo., 507, and perhaps in Hope Mining Company *v.* Brown, 19 Pac. Rep., 218, 7 Mont., 550, but if we were to consider here the public policy of the nation, and to attempt to derive from that a proper construction of this section of the act we should be forced to a different conclusion. We should be constrained to hold that such a construction of this section would not only be contrary to public policy but would defeat the evident purpose of Congress in the enactment of this law. It has been the settled policy of the United States from the passage of the first act of Congress
opening the mineral lands of the nation to exploration
299 and occupation on July 26, 1866, to the present time, to en-

courage the discovery and development of the mineral resources of the country. The Government has practically offered the mineral deposits in the public lands as a reward for their discovery and appropriation to private use. By the act of May 10, 1872, the prospector who discovers a mineral lode or vein on the surface or from the surface is given the right to fifteen hundred feet of the vein or lode for a mere nominal consideration. Such veins frequently appear on the surface of the earth. They are often known to exist before any labor is performed on them. The labor, expense and risk of loss in the discovery and development of such veins from the surface is light indeed in comparison to that required upon a tunnel that is run to discover unknown veins. The work of driving such a tunnel thousands of feet into the side of a mountain for the purpose of discovering a vein or lode that is not known to exist at all, is an extremely hazardous and expensive undertaking. This is common knowledge, and Congress must be taken to have had this knowledge when they enacted this law. They must have known that such a hazardous enterprise was not likely to be undertaken unless rewards commensurate with the risk and expense were offered. In view of these facts can it be successfully maintained that while they secured to the discoverer at or from the surface fifteen hundred feet of his vein, they guaranteed to those who drove a tunnel thousands of feet into the rocks of a mountain nothing but the segments of the veins they found within its bore? We think not. We are of the opinion that by section four of this act they intended to and did guarantee to the owners of such a tunnel the possession of all the veins they discovered therein to the same extent along the veins as if they had discovered them from the surface, and that this guaranty was in full accord with the settled policy of the Government to suitably reward those who discover and develop the mineral resources of the nation.

Moreover, it is not necessary to resort to public policy to find a proper construction for this section. It construes itself. A careful study of it compels the conclusion that inchoate rights to undiscovered veins were thereby guaranteed to the diligent owners of tunnels contingent only upon their discovery therein. The last clause provides that failure to prosecute work upon the tunnel for six months shall be considered as an abandonment of the right to all undiscovered veins on the line of the tunnel. How could such a right be abandoned if it did not exist? The second clause provides that locations by others on the line of the tunnel after the commencement thereof shall be invalid. Why should they be declared invalid unless to secure to the owners of the tunnel their rights to the veins thus discovered and located by others, until these owners of the tunnel could reach and discover them therein? And the first clause of the section declares that: "The owners of such tunnel shall have the right of possession of all veins or lodes within three thousand feet from the face of such tunnel on the line thereof not previously known to exist, discovered in such tunnel, to the same extent as if discovered from the surface." The guaranty
300 of that clause is plain, and certain, and our conclusion is,

that, from the time of the location of a tunnel under section 4 of the act of June 10, 1872, its owner has the inchoate right to the possession of every vein or lode within three thousand feet from the face of such tunnel on the line thereof that was not known to exist when the tunnel was located and its excavation was commenced, contingent only upon the diligent prosecution of the work on the tunnel and the subsequent discovery of the vein or lode therein.

Upon the discovery of such a vein in the tunnel while the work is being prosecuted with reasonable diligence, such owner is entitled to the possession of such lode or vein to the same extent along the lode or vein as if discovered from the surface. No discovery or location of such veins or lodes subsequent to the location and commencement of the tunnel can deprive the owner of the tunnel who diligently prosecutes his work therein of these rights. Back *v.* Sierra Nevada Con. Min. Co. (Idaho), 17 Pac. Rep. 83, 85; Hope Mining Company of St. Louis *v.* Brown (Mont.), 28 Pac. Rep. 732, 734.

Was the inchoate right of the owners of this tunnel to the possession of the then undiscovered Jumbo No. 2 vein lost by their failure to make a claim adverse to that of the owners of the Vestal Lode mining claim when the latter applied for their patent in 1890? Sections 6 and 7 of the act of May 10, 1872, now sections 2325 and 2326 Revised Statutes, provide in effect that any one who has located a claim under that act may file an application for a patent to his claim, together with a plat and certain field-notes, notices and affidavits, that for sixty days the register of the land office shall publish and post a notice that such application has been made, and that, if no adverse claim has been filed at the expiration of said sixty days, it shall be assumed that the applicant is entitled to a patent and that no adverse claim exists. If an adverse claim is properly filed, proceedings in the land office are stayed until the trial and decision by a court of competent jurisdiction of the question who is entitled to the right of possession of the claim, and the patent issues to the claimant who is adjudged to have that right.

There is no doubt that the object of these provisions of the act of Congress is to require the conflicting claims of all parties to be adjusted before the patent issues, so far as that can justly be done at the time the application for the patent is made. The proceedings are judicial in their character and bring all parties who have known existing adverse claims into court. If such parties stand by and, in the absence of fraud or mistake, permit the statutory time for filing adverse claims to run without presenting their claims, their rights so far as they might then have been determined in such proceedings are forever lost. Eureka Con. Min. Co. *v.* Richmond Min. Co., 8 Fed. Cases 819, 825, 4 Sawyer C. C. 302; Kanmaugh *v.* Quartette Min. Co. 16 Colo. 341.

Thus, in Back *v.* Sierra Nevada Con. Min. Co., 17 Pac. Rep. 83, the supreme court of Idaho held that the owner of a tunnel mining claim had the right to make an adverse claim against
301 one who applied for a patent to a lode mining claim which was located across the line of the tunnel and was based on

a discovery made in a shaft sunk directly over the line of the tunnel.

In Ellet *v.* Campbell, 18 Colo. 510, after the owners of a tunnel had discovered a blind vein therein and had located and claimed it, others discovered the same vein from the surface at a distance of some two hundred feet from the line of the tunnel, located their claim on it and applied for a patent for it, and the owners of the tunnel were permitted to file their adverse claim and to litigate the right of possession.

In Hope Mining Company of St. Louis *v.* Brown, 28 Pac. Rep. 732, after the location and commencement of a tunnel, one discovered a blind lode from the surface, located a mining claim upon it which intersected and crossed the line of the tunnel, and then applied for a patent. The owner of the tunnel, who had not yet driven his tunnel through the ground covered by this junior claim, made an adverse claim under this act, and upon his complaint the supreme court of Montana enjoined the applicant from prosecuting his proceedings for a patent until the owner of the tunnel could, in the use of reasonable diligence, drive his tunnel a sufficient distance to demonstrate whether or not the lode claim would be discovered therein.

Cases of this character fall within the letter and the spirit of the provisions of this act of Congress. In each of these cases the blind vein was known to exist when the application for a patent was made. In each of them the vein had been discovered and located, and in each of them the claimant who had discovered it from the surface admitted that it crossed the line of the tunnel. As the vein, its strike, and the grounds of their adverse claims to it were known to each of the respective parties in each of these cases, there was no reason why their claims should not be adjudicated before the patent issued.

But can these provisions for the presentation and adjudication of adverse claims have any just application to such an unknown contingent claim as that which the owners of this tunnel had against the owners of the Vestal claim when the latter applied for their patent? The Vestal claim was not based on the discovery of the then unknown Jumbo No. 2 vein. It did not cross the line of the tunnel. It lay so nearly parallel to it that no vein that crossed the ends of that claim could strike the tunnel without a radical change of its course, and the presumption was that the strike of the vein that these claimants had discovered, was lengthwise and not crosswise of the claim they had located. The line of the tunnel was staked off on the surface of the earth, and the legal record of their claim to it had been made by its owners long before the owners of the Vestal made their discovery and location. The act of Congress declared that the owners of this tunnel should have the right to all the unknown veins they should discover in their tunnel. These facts and these provisions of the law the owners of the Vestal claim knew, and they gave no notice of any claim to any vein guaranteed to the owners of the tunnel by this law. Why then should

the latter be estopped to claim the veins that cross the Vestal
302 location which they have since discovered because they did not adverse the claim of the owners of the Vestal presumptively based on a parallel vein? On the other hand, when the application for the patent of the Vestal claim was made, and when the claim was entered for patent at the land office, the breast of the tunnel was many hundred feet distant from the point where the Jumbo No. 2 vein was finally discovered in the tunnel. If the owners of the tunnel had then made their adverse claim to an undiscovered vein that might at some future time be discovered in the tunnel, and that might pass through the Vestal location, how could they have proved their "right to the possession" of any portion of the Vestal claim under section 7 of the act of May 10, 1872, now section 2326 Revised Statutes? They did not know and no one knew that any such vein passed through the Vestal location, or that any such vein would ever be discovered in the tunnel, or even that any such vein existed. The law does not require an impossibility of any man. It does not require him to know the unknown or to demonstrate that which is incapable of proof, and we are of the opinion that the owners of this tunnel ought not to be, and were not estopped from enforcing the rights guaranteed to them by the act of Congress, because they did not make and maintain their claim to those rights at a time when it was impossible for them to establish them and when no one knew that they existed. In our opinion sections 6 and 7 of the act of May 10, 1872, have no application to cases of this character, in which the existence of the adverse claim is unknown and incapable of fair adjudication until after the land is entered for patent, and we think the owners of the Vestal claim took their patent subject to the right of the owners of the tunnel to the possession of any unknown veins in that claim subsequently discovered in the tunnel, just as they took it subject to the right of the owner of an adjoining mining claim, who never made any adverse claim to their location, to follow on its dip through their patented territory any vein which has its apex in his claim, and just as they took it subject to the right of a junior locator of a cross-vein, who has made no adverse claim, to remove from the territory covered by their patent the ore in that vein not within the space of intersection. Iron Silver Mining Company *v.* Campbell, 135 U. S. 286, 301; Hall *v.* Equator Mining Co., Morrison's Mining Rights, 3d ed., p. 282; Branagan *v.* Dulaney, 8 Colo. 408, 412; Lee *v.* Stahl, 9 Colo. 208, 210; Morgensen *v.* Middlesex Mining and Milling Co., 11 Colo. 176, 179.

The next question for consideration is, to what extent are the owners of a tunnel entitled to a blind vein discovered therein? The appellant claims the possession of the vein in dispute for a distance of fifteen hundred feet and has duly located and claimed this fifteen hundred feet so that fifty-four feet of its claim lie northeasterly of the line of the tunnel and fourteen hundred and forty-six feet southwesterly of it. In 1861, before Congress had enacted any law establishing and defining the rights of those who discovered mineral deposits on the public lands, the legislature of Colorado

passed an act which provided that any person or persons engaged in working a tunnel under the provisions of that act should
303 be entitled to two hundred and fifty feet each way from said tunnel on each lode discovered (Session Laws of Colorado, 1861, p. 166; Mills' Annotated Statutes, sec. 3141), and the court below held that this statute limited the extent of the right of the Enterprise Company to the possession of this vein, and upon that ground entered the decree against the appellant. But the second section of the act of May 10, 1872, provides that a mining claim located after that date, "may equal, but shall not exceed, one thousand five hundred feet in length along the vein or lode." In 1874 the legislature of Colorado passed "An act concerning mines." Section one of that act reads: "The length of any lode claim hereafter located may equal but not exceed fifteen hundred (1,500) feet along the vein." Section 7 provides that any open cut, cross-cut, or tunnel which shall cut a lode at the depth of ten feet below the surface shall hold such lode as if a discovery shaft were sunk thereon. And section 18 reads: "All acts or parts of acts in conflict with this act are hereby repealed." (Session Laws of Colorado, 1874, pp. 185, 187, 190; Mills' Annotated Statutes secs. 3148, 3154.) If the act of 1861 limited the length of a lode claim to two hundred and fifty feet on each side of the tunnel, it was clearly repealed by this act of 1874, and the appellant was entitled under the laws of Colorado as well as under the act of Congress to the possession of the vein in question to the extent of fifteen hundred feet in length. Ellet *v.* Campbell (Colo.) 33 Pac. Rep. 523, 528.

It is urged that if the owner of the tunnel is entitled to the possession of the mineral to the extent of fifteen hundred feet along the vein or lode, he is nevertheless restricted to seven hundred and fifty feet on one side and the like amount on the other side of his tunnel. This contention finds no support in the laws. Section 4 of the act of May 10, 1872, as we have held, entitles him to the possession of the vein to the same extent along the vein or lode as if he had discovered it from the surface. If he had discovered it from the surface he could have located his claim upon and could have held (if he had the superior title as the appellant has here) any fifteen hundred feet along the vein that included his discovery shaft. It follows that the appellant had the right to any fifteen hundred feet of this vein that included its point of discovery in the tunnel, and that its location and claim of possession of fifty-four feet of the vein northeasterly and fourteen hundred and forty-six feet southwesterly of this point of discovery must be sustained.

Finally counsel for appellees insist that the appellant is estopped to claim any of the ore within the boundaries of the Vestal claim because on March 3, 1890, some of the appellees agreed with the then owners of the Hiawatha Lode mining claim that neither they nor their heirs or assigns would ever make any claim to any ore within the Hiawatha location. But there was no covenant in this agreement by any of the parties to it that they would not claim the ore within the Vestal location and this contract is utterly immaterial to the present issue. They also claim that a like estoppel

arises from a certain contract dated July 23, 1890, between
304 certain parties who claim to be the owners of certain lode mining claims, including among others the Vestal claim, but none of the parties to this second contract ever had any interest in the Group tunnel or in the Jumbo No. 2 claim upon which the rights of the appellant rest, nor were either of these claims mentioned in the contract. Counsel say in their brief that the Swickhimers, who were parties to this contract, were the principal grantors of the appellant, and that the contract runs with the land and in that way estops the appellant, but they have failed to call our attention to any evidence that these Swickhimers were the grantors of the appellant, and after a patient search through this voluminous record we are unable to find any such evidence. From this record these contracts do not appear to affect the rights of the appellant in any way and they do not seem to have been considered in the court below.

The result is that this case must be reversed and remanded to the court below for further proceedings not inconsistent with the views expressed in this opinion, and it is so ordered.

Filed February 23, 1895.

305 *Decree.*

And on the twenty-third day of February, A. D. 1895, in the record of the proceedings of said circuit court of appeals is a decree in said cause in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1894.

THE ENTERPRISE MINING COMPANY, Appellant, *vs.* THE RICO-ASPEN CONSOLIDATED MINING COMPANY, David Swickheimer, A. P. Adams, John S. Green, John Kinkaid, A. O. Headley, Julius Thompson, and Frank W. Ingersoll, Appellees.	No. 390.

Appeal from the circuit court of the United States for the district of Colorado.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the district of Colorado, and was argued by counsel.

On consideration whereof it is now here ordered, adjudged, and decreed by this court that the decree of the said circuit court in this cause be, and the same is hereby, reversed with costs, and that the Enterprise Mining Company recover against the Rico-Aspen Consolidated Mining Company, David Swickheimer, A. P. Adams, John S. Green, John Kinkaid, A. O. Headley, Julius Thompson, and Frank W. Ingersoll the sum of six hundred eighty-four and $\frac{35}{100}$ dollars for its costs herein expended and have execution therefor.

It is further ordered that this cause be, and the same is hereby, remanded to the said circuit court with directions for further proceedings not inconsistent with the views expressed in the opinion of this court.

February 23, 1895.

306 United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, clerk of the United States circuit court of appeals, eighth circuit, do hereby certify that the foregoing 305 pages contain full, true, and complete copies of all the pleadings, proceedings, and record entries, including the opinion of said circuit court of appeals, in the case of The Enterprise Mining Company, appellant, *vs.* The Rico-Aspen Consolidated Mining Company *et al.*, appellees, No. 390, December term, A. D. 1894, as the same remain upon the files and records of said United States circuit court of appeals.

Seal United States Circuit Court of Appeals, Eighth Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States circuit court of appeals, at the city of St. Louis, Missouri, this twenty-fourth day of April, A. D. 1895.

JOHN D. JORDAN,
Clerk U. S. Circuit Court of Appeals, Eighth Circuit.

307 UNITED STATES OF AMERICA, *ss*:

Seal of the Supreme Court of the United States.

The President of the United States of America to the honorable the judges of the United States circuit court of appeals for the eighth circuit, Greeting:

Being informed that there is now pending before you a suit in which The Enterprise Mining Company is appellant and The Rico-Aspen Mining Company, David Swickhimer, A. P. Adams, John S. Green, John Kinkaid, A. O. Headley, Julius Thompson, and Frank W. Ingersoll are appellees, which suit was removed into the said circuit court of appeals by virtue of an appeal from the circuit court of the United States for the district of Colorado, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said circuit court of appeals and removed into the Supreme Court of the United
308 States, do hereby command you that you send, without delay, to the said Supreme Court as aforesaid the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 27th day of May, in the year of our Lord one thousand eight hundred and ninety-five.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

309 [Endorsed:] Supreme Court of the United States. No. 1000. October term, 1894. The Enterprise Mining Co. *vs.* The Rico-Aspen Mining Co. *et al.* Writ of certiorari. Filed Jun-11, 1895. John D. Jordan, clerk.

Return to Writ.

UNITED STATES OF AMERICA, *Eighth Circuit*, } *ss:*

In obedience to the command of the within writ and in pursuance of the stipulation of the parties hereto attached, I herewith transmit to the said Supreme Court of the United States a full, true, and complete transcript of the record and all proceedings of the United States circuit court of appeals for the eighth circuit in the within-entitled cause.

Seal United States Circuit Court of Appeals, Eighth Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of the said circuit court of appeals this eleventh day of June, A. D. 1895, at the city of St. Paul, Minnesota, in the eighth circuit.

JOHN D. JORDAN,
Clerk U. S. Circuit Court of Appeals, Eighth Circuit.

310 UNITED STATES OF AMERICA, *ss:*

In the Circuit Court of Appeals for the Eighth Circuit of the United States.

THE ENTERPRISE MINING COMPANY, Appellant,
vs.
THE RICO-ASPEN CONSOLIDATED MINING COMPANY *et al.*, Appellees.

Whereas the appellees have heretofore applied to the Supreme Court of the United States for a writ of certiorari to be directed to the clerk of the above-entitled court, commanding him to certify the record in said cause to the Supreme Court of the United States, which writ has been by said court duly granted, and the same has been by the clerk of said court issued:

Now, therefore, it is agreed and stipulated by and between the parties hereto that the certified transcript of the record in said cause, filed by the appellees with their petition for the said writ, shall stand and be taken as a return thereto, and the clerk of the said circuit court of appeals may file this stipulation and attach the same to the said writ as his return thereto.

Dated at Denver, Colorado, this 8th day of June, A. D. 1895.

CHARLES H. TOLL,
WOLCOTT & VAILE,
Solicitors for Appellant.
C. J. HUGHES, JR.,
C. S. THOMAS,
R. S. MORRISON,
Solicitors for Appellees.

It is further ordered that this cause be, and the same is hereby, remanded to the said circuit court with directions for further proceedings not inconsistent with the views expressed in the opinion of this court.

February23, 1895.

306 United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, clerk of the United States circuit court of appeals, eighth circuit, do hereby certify that the foregoing 305 pages contain full, true, and complete copies of all the pleadings, proceedings, and record entries, including the opinion of said circuit court of appeals, in the case of The Enterprise Mining Company, appellant, *vs.* The Rico-Aspen Consolidated Mining Company *et al.*, appellees, No. 390, December term, A. D. 1894, as the same remain upon the files and records of said United States circuit court of appeals.

Seal United States Circuit Court of Appeals, Eighth Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States circuit court of appeals, at the city of St. Louis, Missouri, this twenty-fourth day of April, A. D. 1895.

JOHN D. JORDAN,
Clerk U. S. Circuit Court of Appeals, Eighth Circuit.

307 UNITED STATES OF AMERICA, *ss*:

Seal of the Supreme Court of the United States.

The President of the United States of America to the honorable the judges of the United States circuit court of appeals for the eighth circuit, Greeting:

Being informed that there is now pending before you a suit in which The Enterprise Mining Company is appellant and The Rico-Aspen Mining Company, David Swickhimer, A. P. Adams, John S. Green, John Kinkaid, A. O. Headley, Julius Thompson, and Frank W. Ingersoll are appellees, which suit was removed into the said circuit court of appeals by virtue of an appeal from the circuit court of the United States for the district of Colorado, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said circuit court of appeals and removed into the Supreme Court of the United
308 States, do hereby command you that you send, without delay, to the said Supreme Court as aforesaid the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 27th day of May, in the year of our Lord one thousand eight hundred and ninety-five.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

309 [Endorsed:] Supreme Court of the United States. No. 1000. October term, 1894. The Enterprise Mining Co. *vs.* The Rico-Aspen Mining Co. *et al.* Writ of certiorari. Filed Jun-11, 1895. John D. Jordan, clerk.

Return to Writ.

UNITED STATES OF AMERICA, *Eighth Circuit,* } *ss:*

In obedience to the command of the within writ and in pursuance of the stipulation of the parties hereto attached, I herewith transmit to the said Supreme Court of the United States a full, true, and complete transcript of the record and all proceedings of the United States circuit court of appeals for the eighth circuit in the within-entitled cause.

Seal United States Circuit Court of Appeals, Eighth Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of the said circuit court of appeals this eleventh day of June, A. D. 1895, at the city of St. Paul, Minnesota, in the eighth circuit.

JOHN D. JORDAN,
Clerk U. S. Circuit Court of Appeals, Eighth Circuit.

310 UNITED STATES OF AMERICA, *ss:*

In the Circuit Court of Appeals for the Eighth Circuit of the United States.

THE ENTERPRISE MINING COMPANY, Appellant,
vs.
THE RICO-ASPEN CONSOLIDATED MINING COMPANY *et al.*, Appellees.

Whereas the appellees have heretofore applied to the Supreme Court of the United States for a writ of certiorari to be directed to the clerk of the above-entitled court, commanding him to certify the record in said cause to the Supreme Court of the United States, which writ has been by said court duly granted, and the same has been by the clerk of said court issued:

Now, therefore, it is agreed and stipulated by and between the parties hereto that the certified transcript of the record in said cause, filed by the appellees with their petition for the said writ, shall stand and be taken as a return thereto, and the clerk of the said circuit court of appeals may file this stipulation and attach the same to the said writ as his return thereto.

Dated at Denver, Colorado, this 8th day of June, A. D. 1895.

CHARLES H. TOLL,
WOLCOTT & VAILE,
Solicitors for Appellant.
C. J. HUGHES, JR.,
C. S. THOMAS,
R. S. MORRISON,
Solicitors for Appellees.

311 [Endorsed:] Case No. 15,884. Supreme Court U. S., October term, 1895. Term No., 600. The Enterprise Mining Company, appellant, *vs.* The Rico-Aspen Consolidated Mining Co. *et al.* Writ of certiorari and return. Filed June 14, 1895.

Endorsed on cover: Case No. 15,884. U. S. circuit court of appeals, eighth circuit. Term No., 600. The Enterprise Mining Company, appellant, *vs.* The Rico-Aspen Consolidated Mining Company *et al.* Filed May 2, 1895.

No. 167-108

Supreme Court, U.S.
FILED.
MAY 2 1895
JAMES H. McKENNEY,
CLERK.

IN

The Supreme Court

OF THE

United States.

OCTOBER TERM, 1894.

267.

THE RICO-ASPEN CONSOLIDATED MINING COMPANY, ET AL,
Petitioners.

vs.

THE ENTERPRISE MINING COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO U. S. CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

IN THE

Supreme Court of the United States,

OF THE

October Term, A. D. 1894.

To the Honorable the Supreme Court of the United States.

I.

Come now the Rico-Aspen Consolidated Mining Company, David Swickheimer, A. P. Adams, John S. Green, John Kinkaid, A. O. Headley, Julius Thompson and Frank W. Ingersoll, and petition this Honorable Court for a writ of *certiorari* to the United States Circuit Court of Appeals for the Eighth Circuit, in a certain case therein lately depending, entitled The Enterprise Mining Company, Appellant, versus The Rico-Aspen Consolidated Mining Company, *et al*, your petitioners; as appellees, and in which said cause a decision was by the said Court heretofore and at the December Term, A. D. 1894, thereof duly entered, reversing the decision and decree of the Circuit Court of the United States for the Eighth Judicial Circuit in and for the State and District of Colorado theretofore rendered in said cause, all of which more fully appears in the record of the proceedings in said cause in said United States Circuit Court of Appeals.

II.

That this application is made under the terms and provisions of section six of the Act of Congress of March 3d, 1891, and entitled, An Act to establish a Circuit Court of Appeals and to define

and regulate in certain cases the jurisdiction of the Courts of the United States, and for other purposes.

III.

That your petitioners filed their original bill in said cause in the Circuit Court of the United States for the District of Colorado on, to wit, the third day of September, 1892, and afterwards by leave of the Court had, filed their amended bill of complaint in said cause on the eighth day of September, 1892, against the said The Enterprise Mining Company, defendant, and in and by the said bill and amended bill of complaint they declared that they were citizens of the State of Colorado, and that the said defendant, The Enterprise Mining Company, was a citizen of the State of New Jersey. That the said Rico-Aspen Company was then and before had been the owner and in possession of a certain lode mining claim, situate in Pioneer Mining District, in the County of Dolores, State of Colorado, called the Vestal lode mining claim, and were the owners thereof, and that the title of the said complainant was based upon a location and an entry in the proper land office thereof for patent.

Your petitioner further alleged in said complaint that up to the first day of August, 1892, the defendant secretly and clandestinely extended certain of its workings into and underneath said Vestal claim, and then unlawfully broke down, destroyed and removed therefrom large and valuable quantities of gold and silver bearing ore, then being the property of your petitioners, and were at the time of the filing of said bills engaged in said work of breaking, selling and removing said ores, and threatened to continue so to do to the destruction of your petitioners' property therein and to their irreparable injury and damage, because they said

that the said Vestal lode mining claim was only valuable for the ores therein contained. And they further declared and alleged that upon inquiry made of the officers of said defendant company as to what the said company was doing, your petitioners were informed that no work of any sort was being done by the said defendants anywhere within the said Vestal lode mining claim, and which knowledge and information so furnished in reply to said request was then and there false and made for the purpose of misleading your petitioners. And your petitioners further alleged that for the purpose of maintaining their unlawful position to enable them to further despoil your petitioners' property in said Vestal lode mining claim the said defendant introduced armed men into the said workings, and also by means of smudges and explosives which were by it then used, it destroyed large portions of the workings of your petitioners and exposed their workmen to great danger and loss of life.

Your petitioners further alleged in said complaint that the said defendant company was insolvent, that no adequate relief could be obtained by your petitioners through the agency of a court of law, and that it was, therefore, absolutely necessary that your petitioners should apply to a court of equity for the relief necessary. Wherefore your petitioners prayed for a temporary injunction, for a hearing upon the bill and answer, for such permanent relief as to the Court might seem meet and proper, and for a perpetual injunction against the said defendant.

IV.

Your petitioners further declare that afterwards and and on the 20th day of September, 1892, the said defendant, The Enterprise Mining Com-

pany, filed its answer, and on the 21st day of September, 1892, its cross bill in said cause against your petitioners. That in and by its said answer it denied the allegations of your petitioners' complaint, except that it admitted its entry into and underneath the said Vestal lode mining claim, and the extraction of ores, not exceeding in value the sum of ten thousand dollars; that by its affirmative answer defendant alleged that on the 25th day of July, 1887, Charles Newman, Matthew T. Chestnut and William L. Stephens, being citizens of the United States, located a certain tunnel site, under the statutes of the United States, and in full compliance therewith and of the laws of the State of Colorado, 1,500 feet in length, upon the mountain where said Vestal lode mining claim was situate, immediately after which they began the work of excavating said tunnel, and had extended the same about the first day of August, 1891 for a distance of 1,500 feet into the side of the mountain. That at the time of the location and survey and record of said Group Tunnel site, and for more than two months thereafter no vein, lode, ledge or mineral deposit had been discovered or was known to exist on or crossing said tunnel, and no vein of any character whatsoever had been discovered within the premises described in the bill of complaint and lying within the boundary lines of the Vestal claim, or was located or claimed or in the possession, or claimed to be in the possession of any person whomsoever until long after the location of said tunnel site. That when the said tunnel site and premises were located the ground included within the limits of the Vestal lode mining claim were wholly unoccupied and claimed by no person and were a portion of the public mineral domain of the United States, subject to the right of owners of said tunnel site or

their grantees to the possession of such veins or lodes, as should be discovered in said tunnel, and by the complainants as the Vestal lode mining claim. That prior to and for a long time after the location of said tunnel and the commencement of work thereon, no vein or lode bearing gold or silver or other metal, had been discovered, or claimed to be discovered, at any point within the premises referred to in the bill of complaint, as the Vestal mining claim. That on the 3d day of April, 1888, the Vestal lode mining claim was located, but upon no discovery of any vein or lode bearing gold or silver, or other metal, within its boundaries. That in the month of September, 1891, the said Group Tunnel site locators had expended more than Seventeen Thousand Dollars upon, and run said tunnel, to a point more than 1,500 feet from the face thereof, and had cut certain lodes or veins, the existence of which were not known previous to the location of such tunnel, and which had no apex or cropping at the surface of the earth, but were blind lodes, having their tops in solid rock in place at a great depth beneath the surface of the earth, to-wit, at a depth of more than 300 feet beneath the surface, and that the owners of the tunnel site were engaged on the continuous extension of said tunnel along and on the line thereof, with the design and for the purpose of cutting therein other lodes not known to exist prior to the location of the tunnel. That in or about the said month of September, 1891, one George Crawford purchased of the said locators said tunnel site, and paid therefor some Two Hundred and Fifty Thousand Dollars and received a grant thereof, after which the said Crawford by certain mesne conveyances and for large and valuable considerations by him received from the said defendant, conveyed the said tunnel to said defendant, which

thereupon became the lawful owner thereof, and thereafter actively and continuously prosecuted and extended said tunnel with the design of cutting and discovering veins not known to exist prior to its location. That work had been prosecuted upon said tunnel continuously after its location. That on June 15th, 1892, the defendant while excavating the said tunnel and at a distance of 1,920 feet from the face thereof, cut and disclosed a vein or lode of quartz, in place bearing gold and silver, and which vein was a blind vein not appearing at the surface, with its top or apex in solid rock at a depth of more than three hundred feet below the surface, extending in its course across said tunnel northeasterly and southwesterly, and which vein was not prior to the location of said tunnel or prior to August 1st, 1891, known to exist or found or discovered. That upon the cutting and discovery of said vein in the said Group Tunnel defendant located and claimed said vein and possession thereof under and by the name of the Jumbo No. 2, for 1,500 feet in length, 54 feet being north, 54 degrees 30 minutes east from the point of discovery, and 1,446 feet running south 54 degrees and 30 minutes west of said discovery with 150 feet on each side of the middle of the vein at the surface, and which they caused to be duly staked, as required by the laws of the State of Colorado, by reason whereof and ever since the 15th day of June, 1892, they have been entitled to the right of possession of the said Jumbo No. 2 vein; and by means of certain drifts and workings they did, and sometime prior to the first day of Setpember, 1892, it was charged that your petitioners had wrongfully and unlawfully entered upon said Jumbo No. 2, vein and removed valuable ores therefrom to the extent of some ten thousand dollars in value.

That the said Vestal lode claim is nearly parallel with the Group Tunnel and does not touch any portion of the line thereof. That at the time the Vestal mining claim was entered in the U. S. Land Office, as alleged in said complaint, the Group Tunnel had not been excavated or run to a point nearer than 800 feet from that part of the Vestal claim nearest to the line of the tunnel, and that prior to the time of the alleged entry of said Vestal claim no vein or lode had been disclosed or cut in said tunnel which extended running in the direction of or towards the Vestal mining claim. That the said Jumbo No. 2 claim extends in its course across the larger portion of the westerly end of the Vestal claim, and does not for any distance along the course thereof extend in the direction of the location of the Vestal claim and is a cross vein to such claim. And after the discovery and location of the said Jumbo No. 2 vein the defendant's workmen run a drift which passes beyond the westerly end line of the Vestal claim and into and underneath the same, for the purpose and with the design of connecting therewith other drifts which the defendant had been engaged in running along said vein from its point of discovery in the Group Tunnel, and which was the same work complained of by complainants as a trespass committed on this property.

And the defendant company further charged in and by its said answer that your petitioners, while knowing the rights of defendant in and to the premises, sunk a shaft through barren earth and rock some four hundred feet away from the point of the corner of Jumbo No. 2 vein, and extended a cross cut from said shaft through barren earth and rock towards and in the direction of said Jumbo No. 2 vein, for the purpose and with the design of

extracting the ores therefrom and converting the same to your petitioners' own use; and that they had been engaged in said work of extracting and breaking ores and converting the same to their own use during all the times shortly prior to the first day of September, 1892, and from thence down to the filing of the said answer.

V.

Your petitioners further represent and declare that the cross bill of the said defendant company contains allegations substantially the same as those appearing in the answer aforesaid, and alleges, among other things, that although the said vein called the Jumbo No. 2 had been cut in said tunnel on the 15th day of June, 1892, it had been known to exist from about the 10th day of August, 1891; and said cross complaint prayed against your petitioners the same relief which had been asked as against them in your petitioners' said bills of complaint.

VI.

That after the filing of the said pleadings, together with certain affidavits in support of the allegations thereof, temporary writs of injunction were issued by the said Circuit Court against both the parties thereto, and afterwards and prior to the 22d day of December, 1892, the said cause came on for hearing before the said Circuit Court upon the said pleadings and evidence submitted on behalf of the contentions of the respective parties thereto.

VII.

That afterwards and on to-wit, the 22d day of December, A. D. 1892, the judge of said Circuit Court announced a decision in that and two other

cases then pending between the same parties of and concerning certain other locations upon said mountain, and which said decision appears in the 53d volume of the Federal Reporter on page 321 and following.

VIII.

That afterwards and on to-wit, the 22d day of May, A. D. 1893, a stipulation was entered into between the said parties, which said stipulation appears on pages 67 to 70 of the printed transcript of the record of said cause in the Circuit Court of Appeals aforesaid, a copy of which said printed transcript is filed herewith for the convenience of this Honorable Court. And in and by said stipulation it is declared among other other things that the said cause shall be determined and final decree entered therein subject to the right of appeal upon the issues joined upon the bill and cross bill and upon the affidavits and documentary evidence therein mentioned, which should be taken and considered for all the purposes of said cause as if the evidence had been regularly taken before a Master, and as if the witnesses who made said affidavits had personally appeared and been examined and cross examined; the evidence referred to in said stipulation being duly itemized in said stipulation.

IX.

That afterwards and on the 5th day of June, A. D. 1893, the said stipulation was altered and modified by agreement so that a copy of the patent of the Vestal lode was inserted in the place of the Receiver's receipt mentioned therein, and the location certificate of the Jumbo lode was inserted in place of the Receiver's receipt mentioned in the original stipulation. That thereupon and

extracting the ores therefrom and converting the same to your petitioners' own use; and that they had been engaged in said work of extracting and breaking ores and converting the same to their own use during all the times shortly prior to the first day of September, 1892, and from thence down to the filing of the said answer.

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on the said 22d day of May, A. D. 1893, and pursuant to said stipulation, a decree was entered by the said Circuit Court in said cause, perpetually enjoining the said defendant from in any wise interfering with or entering upon and underneath the said Vestal lode mining claim, or from asserting any title thereto, or to any ores taken therefrom, and the said cross bill was dismissed and the temporary injunction theretofore mentioned was dissolved. Whereupon said defendant company prayed an appeal to the Circuit Court of Appeals for the said Eighth Judicial Circuit, and afterwards and within the time fixed by law duly filed a transcript of the record in said cause in said Circuit Court. And your petitioners further allege that the said cause coming on to be heard in the Circuit Court of Appeals at St. Louis in said Circuit, on or about the 7th day of January A. D. 1895, and afterwards and on, to-wit, the 23d day of February A. D. 1895, at the December term, A. D. 1894, of said Court, the decree in said cause was reversed and the same remanded to the Court below for further proceedings not inconsistent with the views expressed in said opinion, whereby the said decree of the said Circuit Court was set aside and for nought held.

X.

Your petitioners further allege that the following among other things appear to be undisputed facts from said record: That the owners of said Vestal lode mining claim, after its location, duly applied for patent in the proper land office of the United States and duly complied with all the requirements of the laws and regulations of the Departments concerning said application, and no protest, adverse or other hostile proceeding was

begun or attempted by the owners of said Group Tunnel site against said application. That prior to the commencement of said action the said claim had been entered and a Receiver's receipt duly issued therefor by the proper land officers, and pending the said controversy a patent had been issued by the government of the United States upon said application for said Vestal lode, without any protest or objection whatever on the part of the said defendant company. That the said pretended Jumbo No. 2 vein was originally alleged to have been discovered by the defendant in a certain claim called the Jumbo, lying west of the westerly end of the Vestal lode mining claim, after which the said tunnel was driven by the said defendant in its own direction northeasterly of the said Vestal lode mining claim, for the alleged purpose of cutting the said pretended vein in its northeasterly course. That the said Group Tunnel had been acquired by the said Enterprise Company for the purpose of facilitating and simplifying the work and development of a group of lode mining claims crossing said tunnel, called the "Enterprise Group," the title to which had been acquired by the defendant company at or before the time of its purchase by the said Group Tunnel. That the said alleged and pretended discovery in the said tunnel by the defendant of the so-called Jumbo No. 2 vein was made within the surface boundaries, extended downward vertically, of a certain lode mining claim belonging to the said Enterprise Company and crossing the line of said tunnel, known as and called the "Hiawatha," and which had been segregated from the public domain long before the said alleged discovery, and claimed as the private property and premises and in the possession of the said defendant company. That the said pretended

location of the Jumbo No. 2 lode mining claim extends 1,446 feet upon one side and 54 feet upon the other side of the centre of said tunnel, and is thrown across the patented premises of your petitioners, and also across that certain other claim of the defendant company called Jumbo. That the location certificate or declaration of the Group Tunnel site among other things alleges right of possession of 1,500 feet in length and 300 feet in width of all veins, lodes, ledges or mineral deposits along the line thereof that may be discovered or intersected by the tunnel or any cross-cut therefrom. That the defendant company made no pretense of any abandonment or repudiation or relinquishment of its right of claiming title and ownership in and to the Hiawatha lode mining claim, either at, before or subsequent to the time of the alleged pretended discovery of the said Jumbo No. 2 vein therein.

XI.

Your petitioners further allege that it also appears from the overwhelming preponderance of the testimony in said cause and from the admissions of the witnesses of the defendant company, as well as from the positive statements of the witnesses of your petitioners, that throughout the said mountain where said claims are located there is a horizontal sheet or blanket deposit or layer of metalliferous bearing rock or ore, bounded above by a stratum of shale, and immediately beneath by a stratum of limestone rock, and which extends indefinitely throughout said mountain, having a very slight dip or incline from a horizontal. That said deposit was known to exist within said mountain years prior to the location of the said Group Tunnel site, and is a great underlying contact vein, and

within and uniting with which all valuable ores and deposits in said mountain have been found; that at intervals along the floor of the said contact vein are cracks or fissures extending downward and into which, from said contact vein and forming a part thereof, ores are found. That no part of said ores found in said vertical cracks or openings are disconnected or independent from the said contact vein, and none have ever been found to extend into the shales above the said contact vein at any point or place; and that any deposits so found within the said floor of said vein and below the line of said floor are a part and parcel of said contact vein and wholly inseparable and indistinguishable therefrom; and that the pretended Jumbo No. 2 vein consists only of the penetration by the said tunnel of one of said cracks or openings descending from the said main contact vein and connected with and an inseparable part and portion thereof.

XII.

That it further appears in and by said stipulation as well as by the recitals of the decree itself, that the same was based and founded upon, and involved the consideration of, all of the facts appearing in the evidence in said controversy, as well as upon the law relating thereto.

XIII.

Your petitioners further aver that by the decision of the said Circuit Court of Appeals in said cause, a copy of which is filed herewith, and according to the syllabus of the said decision as prepared by said Court of Appeals, it was by said Court decided and determined:

1. "From the time of the location and commencement of the tunnel under section 4 of the act

of May 10, 1872 (Sec. 2323 Rev. Stat.), the owner has an inchoate right to the possession of every blind vein or lode within three thousand feet from the face of such tunnel on the line thereof that was not known to exist when the tunnel was located and commenced, contingent only upon the diligent prosecution of work on the tunnel and the subsequent discovery of the vein or lode therein.

2. No discovery or location of such veins or lodes from the surface subsequent to the location and commencement of the tunnel can deprive the owner of the tunnel claim who diligently prosecutes his work therein on these rights.

3. Upon the discovery of such a vein in the tunnel while work upon it is being prosecuted with reasonable diligence, such owner is entitled to the possession of such lode or vein to the same extent along the lode or vein as if discovered from the surface. He is entitled to the possession of any 1,500 feet in continuous length along such lode or vein which includes the point of discovery in the tunnel. The limit of the extent of the right of the owner of the tunnel claimed to the veins discovered therein to 250 feet each way from the tunnel imposed by Section 5 of the Act passed by the Colorado legislature in 1861 (Session Laws of Colorado 1861, page 166, Mills Annotated Statutes, Section 3,141), was removed by the Act of Congress of May 10, 1872 (17 Stat. C. 152, p. 92), and the act of the legislature of Colorado of 1874 (Session Laws of Colorado, pp. 185, 187, 190, Mills Annotated Statutes, Sec. 3148).

4. It is the duty of the owner of the tunnel claim to present and litigate his adverse claim to any such blind vein or lode that has been discovered, and is known to exist within a mining claim located from the surface when the owners of the latter make application for their patent under Sections 6 and 7 of said Act. (Secs. 2,325 and 2,326, Rev. Stat.) And if in the absence of fraud or mistake he fails to do so, his rights as against such claimants will be lost. When, however the blind lode or vein is not known to exist and has been

discovered, when the application for patent is made and the claim of the locators from the surface lies parallel to the line of the tunnel, these sections of the Act have no application, because it is impossible in such a case to fairly litigate the contingent inchoate right of the owner of the tunnel, and he will not be estopped by his failure to present an adverse claim."

XIV.

Your petitioners further represent that the Colorado statute concerning tunnel claims as referred to by the said syllabus, was enacted by the Legislature of the Territory of Colorado in 1861, and has since said time been carried into and through the revisions of the statutes of said State, and appears in the latest revision thereof as sections 3,140 and 3,141 of Mills Annotated Statutes, as follows:

"Sec. 3,140. If any person or persons shall locate a tunnel claim for the purpose of discovery, he shall record the same, specifying the place of commencement and termination thereof, with the names of the parties interested therein.'

Section 3,141. "Any person or persons engaged in working a tunnel within the provisions of this chapter shall be entitled to 250 feet each way from said tunnel on each lode so discovered, provided they do not interfere with any vested rights. If it shall appear that claims have been staked off and recorded prior to the record of said tunnel, on the line thereof, so that the required number of feet cannot be taken near said tunnel, they may be taken upon any part thereof where the same may be found vacant, and persons working said tunnel shall have the right of way through all lodes which may lie in its course."

XV.

Your petitioners further declare that in the statement accompanying the said opinion of the said

United States Circuit Court of Appeals, and prepared by the said Court, is the assertion that the decree of the Circuit Court in said cause was rendered upon the theory that the Enterprise Company could not maintain its claim to the area in question, if the allegations of its pleadings were conceded to be true. The decree, therefore, was said to have the effect of a decision sustaining a demurrer to the pleadings of the appellant, and the said Circuit Court of Appeals therefore declared that it would consider the case on the assumption that the allegations of the pleadings of appellant were true, upon which assumption certain facts were cited in said statement, and those alone seem to have been considered as the basis of said decree. Your petitioners respectfully complain that great and manifest error appeareth in said decision as to each and every of the propositions by it announced, as hereinabove recited, and as appears therein, and they allege for such errors the following.

1. The decree of the Court below was not based or rendered upon the theory that the allegations of the pleadings of the Enterprise Company were true; but on the contrary it was rendered upon the entire record, including all testimony offered, for the Court's consideration. The opinion of His Honor Judge Hallett, reported in 53 Federal 321, was delivered after consideration of three cases, one of which was that now under consideration; the other two substantially between the same parties presented a consideration of the rights of the said Enterprise Company as against two other locations of the Rico-Aspen Company called the Compromise and Contention. In addition thereto the decree was not signed by Hon. A. D. Thomas, District Judge, and not rendered until the expiration of exactly five months from and

after said opinion, and only after the stipulation shown by the record had been executed. The facts, therefore, were in issue, but were not given consideration by said Court. By that stipulation the parties agreed that "the case shall be determined and final decree entered therein, except to the right of appeal upon the issues, as shown in the bill and cross bill and upon the affidavits and documentary evidence herein mentioned, which shall be taken and considered for all the purposes of said cause as if the evidence had been regularly taken before a Master and as if the witnesses who made said affidavits had personally appeared and been examined and cross-examined." Page 67 transcript. Also that nothing in the opinion should be considered or taken as a finding of fact, that the Vestal location was prior in date to the location of the Group Tunnel site. Page 70 transcript.

The decree recites that "the cause coming on to be heard on the bill, answer and replication, together with the affidavits and documentary evidence in support thereof, that the same was fully considered and that the Court doth find the issues therein joined for the complainants."

Your petitioners respectfully submit that whatever expressions may be contained in the said opinion of the said Circuit Court, yet since the opinion was never filed in said cause, and the decree was based upon a stipulation made five months thereafter, and recites the different matters upon which it was founded, the Honorable Circuit Court of Appeals was not justified in refusing to consider and pass upon the facts in said cause, and after a careful review and consideration of said facts, would, independently of the soundness or unsoundness of the legal propositions enunciated,

have required that the said decree should be affirmed. Your petitioners also most respectfully submit that the opinion of the said Circuit Court forming no part of the record, and not having been filed at any time in the lower Court, and no copy thereof having been certified by the clerk of said Court, as required by the rules, the said Court of Appeals erred in considering it at all.

Your petitioners further most respectfully urge that the decree of said trial Court, being justified by reasons and considerations other than those expressed by the Honorable Judge of the Circuit Court, any unsound or illogical reason given for the same should not operate to reverse the decree. Your petitioners also respectfully suggest that the said opinion of the said Circuit Court does not sustain the concluson that the same was based upon any admission of the truth of the averments of the defendants' answer.

The first error of law which your petitioners suggest, therefore, is that the said Circuit Court of Appeals erred in declining to consider the facts presented by the said record and upon said stipulation, and in considering or reviewing the opinion of the Circuit Court at all.

2. The said Court erred in declaring that a tunnel owner who prosecutes work thereupon with diligence is entitled, upon cutting a lode, in his tunnel, not appearing on the surface, to 1,500 feet in either direction as against prior locators. This announcement, your petitioners respectfully submit, is opposed to the principle decided by this Court in the case of Erhardt vs. Boaro, 113 U. S., 527; where it was held that where a prospector posts a notice upon a discovery that he claimed 1,500 feet, without designating the direction or distance he could prevent other locations 750 feet in either

direction but not to the extent of 1,500 in either direction. The notice of location of the Hawk lode in the Erhardt case and of the Group Tunnel site in this case is in that respect identical. See printed transcript, pages 269 and 270.

3. Your petitioners suggest error in said decision in that it is opposed to the previous rulings of the Interior Department and to all adjudicated cases on the subject of tunnel rights under section 2,323 of the Revised Statutes of the United States wherever the same have been adjudicated.

From the construction given in the Land Department, and from that given by the Colorado Supreme Court, vested interests of vast extent in value and area have been acquired, the ownership and enjoyment whereof are seriously menaced by the said decision. According to the said decision, the owner of a tunnel site properly located is virtually the proprietor of a grant of 3,000 by 3,000 feet in extent, equal in the State of Colorado to twenty mining claims or about 206 acres of ground, and prospectors who discover or patent veins within said area, unless they appear at the surface, cannot hold and enjoy the same as against said tunnel owner. Your petitioners respectfully submit that a recognition of the rights of tunnel claimants or owners to the extent determined by said decision has never before been claimed by any tunnel owner.

4. Your petitioners respectfully show that the said Court erred in its declaration that the owner of a tunnel claim is only obliged to present and litigate his adverse claim to such blind vein or lode as has been discovered and known to exist within a mining claim located from the surface, when the owners of the latter make application for patent, but when a blind vein or lode is not known to exist

and has not been discovered at the time of said application of the claim located from the surface, which lies parallel to the line of the tunnel, such obligation is not imposed upon the tunnel owner.

Your petitioners respectfully suggest that the effect of this decision is to incorporate into a patent of the government an exception broad enough to destroy the entire grant, and in any event to seriously impair and limit its operation and to declare an exception not recognized or based upon any known statute or rule of the common law. Ever since the decision of the Eureka case in 1877 by His Honor Justice Field, the necessity of an adverse on the part of persons claiming any rights not excepted by statute from the patent to a mining claim has been recognized and enforced, and where a tunnel has not been driven far enough to determine the existence of the tunnel claimant's right, the courts have enjoined the owners of locations from prosecuting application for patent until such work could be done.

The location of the Vestal claim, coincident with and not across the line of the tunnel is immaterial. If the tunnel owner is entitled to the possession of all veins within an area of 3,000 feet from the mouth of the tunnel, he must adverse or prevent an application for patent from proceeding to a finality or lose any right claimed by virtue of such tunnel location.

The said decision deprives the owner of the lode location of the exclusive right guaranted to him by Section 2,322 of the Revised Statutes of the United States, so frequently recognized and enforced by this Honorable Court.

5. The said Court erred in declaring that grantees of patents to lode locations take the same, subject to the right of a junior locator of cross

veins who has made no adverse claim, to remove from the territory covered by their patent, ore within that vein not within the space of intersection. This assertion involves a construction of Section 2,336 of the Revised Statutes, which only applies to veins crossing or uniting on their dip, and not to a crossing of veins upon their strike. The Act of May 10, 1872, like all other statutes, should be construed as an entirety.

6. The Court erred in holding that the Enterprise could initiate a title to Jumbo No. 2 vein, although the discovery thereof appears to have been made within the limits of a valid location owned by said company. It clearly appears from the record, and especially from the maps accompanying the affidavit of Farish and the prospectus of the Enterprise Company, pages 153 and 267 of the printed transcript, as well as from the affidavits and numerous documents in the record, that the Hiawatha is one of the Enterprise Company's mines, of which it had possession, and the legality of which was never disputed.

The Act of Congress of May 10, 1872, permits citizens and those who have declared their intention to become such to prospect on the unappropriated public domain for valuable mineral deposits. A claim, when it is properly located, ceases to be part of the public domain, and no independent location can be initiated by discovery within the limits of said location. Such a construction of the act also does violence to the exclusive right of possession given by Section 2,322 of the Act, and is directly opposed to the principle announced by this Court in Gwillem vs. Donnellan, 115 U. S. 45.

Your petitioners respectfully submit that if it be true, as announced in said opinion, that all locations made within 1,500 feet on either side of the

tunnel are held subject to the discovery of a vein in said tunnel not appearing at the surface, and that an exception exists to that extent in every location, whether patented or otherwise, in favor of the tunnel locator, nevertheless, such exception cannot survive joinder of the title to the location and to the tunnel site in the same person, for that would be to carve an exception out of one's estate for his own benefit. The acquisition by the Enterprise Company of the Hiawatha lode prior to the alleged discovery of the Jumbo No. 2 by the tunnel does not give the Enterprise Company the right to assert an exception from the grant of its location of the Hiawatha in its own favor, which under its tunnel site title it can assert against a third person. No other reported decision ever asserted such a doctrine.

7. Your petitioners further suggest that the Court below erred in holding that the Act of May 10, 1872, and the Colorado Territorial Act of February, 1874, operated to repeal the Colorado tunnel act of 1861. The Act of May 10, 1872, expressly authorizes the legislatures of the States and Territories and the miners of the mining districts to enact such rules and regulations as might to them appear to be necessary and desirable and which were not in conflict with the Federal law. It also expressly recognized the validity and existence of such laws and regulations then in existence as did not conflict therewith. The Territorial Act of 1861 has been carried through the different revisions of the laws of the State, and have been acted upon, recognized and asserted from thence up to the date of the said Court of Appeals' decision. The recognition of the existence of this law eliminates the Vestal claim from the controversy, because it

would not come within the area of 250 feet on either side of the line of said tunnel.

Your petitioners further respectfully suggest to and inform this Honorable Court, that since the passage of the Act of 1872, a large number of tunnel sites have been located throughout the mountain regions of the United States, and many thousands of mining claims have also been located and patented, and vast interests have been acquired and rights vested under the operation of the said mining act, and tunnel owners have, under the early decisions, acquiesced in the construction given to the said acts by the courts and the departments limiting the tunnel owner to the width of his tunnel, and prohibiting explorations thereupon by outsiders. That since this decision tunnel claims which had become dormant and upon which lazy and perfunctory work only had been done have become active, and a vast multitude of litigation threatens the owners of mines and mining claims, both patented and unpatented, whose titles were supposed to be absolute, and which, if said decision correctly states the law, must, in most cases, be successful; that actions sounding in damages for enormous sums for ores heretofore taken out by the owners and possessors of mines and mining claims in good faith, will crowd the courts to the undoing of *bona fide* owners and possessors of mines and mining claims. That speculation in old tunnel sites has already become active, their value being entirely dependent upon said decision, while many new ones are being located, with the view of monopolizing thereby valuable public mineral domain, so that beyond the immediate interest and importance of the said decision to your petitioners the said case is one of vast and almost unbounded consequence to all of the mining States and Territo-

ries and the owners of mining properties acquired under the Act of May 10, 1872, everywhere.

Your petitioners further respectfully represent that the jurisdiction of the Circuit Court of the United States in said cause is based upon the allegation in said pleading of citizenship alone; and, therefore, notwithstanding the construction of Federal statutes is involved in said decision and in the ultimate determination of said cause, yet your petitioners have no right of appeal from the said Circuit Court of Appeals to this Honorable Court.

Your petitioners further respectfully represent and show to this Honorable Court that the construction of the rights of tunnel site owners or locators under the said Act of May 10, 1872, has never before been directly presented to the consideration of an Appellate Federal Court, but that there is now pending in this Honorable Court on error to the Supreme Court of the State of Colorado a case entitled Campbell, *plaintiff in error*, vs. Ellet, *defendant in error*, which involves the construction of said section of said statute, and that a determination of the question involved in this case by this Honorable Court is necessary to finally settle them and to establish a rule of property by which the rights of all owners of mining claims and tunnel sites may be measured, and litigation, controversy and bloodshed prevented.

Your petitioners, therefore, respectfully pray this Honorable Court to issue a Writ of *Certiorari* to the said United States Circuit Court of Appeals for the Eighth Judicial Circuit, requiring it to certify to this Court, under Section 6 of the said Act, of Congress approved March 3, 1891, a true, full and complete record of the said cause of The Enterprise Mining Company, appellant, vs. the Rico-Aspen Consolidated Mining Company *et al.*, defendants, and

numbered 390 on the dockets of said Court, with all convenient speed ; that this Honorable Court will review the same and determine whether error has been committed by the said Court in its said decision, as herein alleged, and also to set at rest and finally determine, among other things, (1) whether a tunnel intersecting a vein not appearing at the surface within the limits of a claim located across the line thereof, but junior thereto, can, when such location and tunnel site belong to the same owner, initiate a new title to a lode location on a vein or lode so discovered. (2) Whether the locator of a tunnel site has an inchoate or any right to any and all veins not appearing at the surface intersected by such tunnel, as against lode claims subsequently made, to the extent of 1,500 feet in either direction from the point where the said vein is so intersected, as the owner of the tunnel may at his pleasure determine. (3) Whether in any event or under any circumstances the owner of a tunnel site has the right, in the State of Colorado, under its statutes, to any veins which may be interesected by said tunnel, for a distance of more than 250 feet on either side of the line thereof. (4) Whether the owner of a tunnel site is not required, in order to preserve any right given him by the statutes of the United States as against subsequently located lode claims within 1,500 feet from the said tunnel, whether crossing said line or not, to adverse all applications of such lode claims for patent, or to enjoin the prosecution of application for patent thereto, until such tunnel can be extended so far as may be necessary to ascertain the existence of lode claims not appearing at the surface, crossing the line of said tunnel. (5) Whether there is excluded from the operation of the grant of a patent of the

United States for a lode mining claim, anything beyond that which by the express terms of the grant is excepted therefrom, or any implied exception which would operate to exclude a lode covered by the patent and afterwards discovered in a tunnel previously located. And in duty bound your petitioners will ever pray.

The Rico-Aspen Consolidated Mining Co

UNITED STATES OF AMERICA, }
DISTRICT OF COLORADO, } ss.

On this day personally came A. B. Roeder, who being first duly sworn, according to law, deposes and says that he is one of the directors and the treasurer of the above Rico-Aspen Company; that he has read the above and foregoing petition for a writ of *certiorari* in said cause, and that the matters and things therein set forth are true, according to the best of his knowledge, information and belief.

167-168

No. 600

Office Supreme Court U. S.
FILED.
MAY 2 1895
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

RICO-ASPEN CO., ET AL.

v.

ENTERPRISE CO.

267.

BRIEF ON PETITION FOR CERTIORARI.

CHAS. J. HUGHES, JR.
CHAS. S. THOMAS.
R. S. MORRISON.

UNITED STATES OF AMERICA, ss.

In the Supreme Court.

BRIEF ON PETITION FOR CERTIORARI.

In the Case of

THE ENTERPRISE MINING COMPANY, *Appellant,* vs. THE RICO-ASPEN CONSOLIDATED MINING COMPANY, *et al,* *Appellees.*	*No. 390 in the Circuit Court of Appeals, Eighth Circuit.*

Point 1. The ruling of the Court declaring a tunnel owner who prosecutes a tunnel with diligence, entitled upon cutting a lode in his tunnel to 1,500 feet in either direction as against prior locators.

This we claim to be opposed to the principle decided by the Federal Supreme Court in *Erhardt v. Boaro*, 113 U. S. 527.

If the Court had allowed the tunnel owner 750 feet each way, the point would not be controlled by that case.

Erhardt, a prospector, had just found a lode on which he had the right to claim 1,500 feet in any direction. He had posted his notice claiming his 1,500 feet, but not specifying in what direction.

The Court ruled that he could prevent location 750 feet in either direction, but not to the extent of 1,500 feet in either direction.

The law gave him the right at the moment of discovery to claim 1,500 feet, but he could not prevent others prospecting within a radius of 3,000 feet. If he failed to designate on which side or sides he would locate his 1,500 feet, the law would limit him to the presumption that he claimed his discovery as his center.

Exactly analagous is the case at bar, conceding, for the purposes of this petition, to the tunnel absolutely the same right as to a surface discoverer.

The Tunnel Notice (page 269) claims the right to 1,500 feet on all undiscovered lodes. Erhardt, the discoverer, in the case before the Federal Supreme Court, had the same notice.

HAWK LODE.

"We, the undersigned, claim 1,500 feet on this mineral-bearing lode, vein or deposit.

"Dated June 17, 1880.

"JOEL B. ERHARDT, 4-5ths.

"THOMAS CARROLL, 1-5th."

GROUP TUNNEL SITE.

"*Know All Men by These Presents*, That the undersigned hereby locate and claim this tunnel site, beginning at this point and running S. 57°, E. for a distance of 3,000 ft., and the right of possession of 1,500 ft. in length and 300 ft. in width of all veins, lodes, ledges or mineral deposits along the line thereof that shall be discovered or intersected by this tunnel or any crosscut therefrom. Size of tunnel, 4 ft. by 6½ high.

"CHARLES NEWMAN,

"W. L. STEPHENS,

"MATTHEW T. CHESTNUT."

Either one might have claimed 1500 feet east or 1500 feet west, if the notice had designated the direction. Not having done so, neither could bar

prospecting for double the distance over which his claim could be finally extended.

In the case covered by this Petition the Vestal lode was patented more than 750 feet east of the tunnel. At the same time other lodes were located west of the tunnel. As the decision stands the tunnel owner, upon cutting the vein, could demand from either, that he had priority of title, against either the five or six patented claims shown within a radius of 1,500 feet east, or against a like number within 1,500 feet west.

The Court in quoting the Colorado statute say it allows to a tunnel discovery the same rights as a surface discovery. If that be true it cannot have any greater. No surface notice is required after the tunnel discovery. All lodes cut in it are protected by its notice at tunnel mouth. That tunnel notice could specify on which side it claims the 1500 feet. Not having done so, it comes within the express and authoritative ruling of the Boaro case that it is presumed to take such 1500, feet equidistant from its center point.

2. Cotemporaneous construction, now departed from. Novelty and importance of the decision.

This tunnel law was passed May 10, 1872. The question at once arose what was meant by the "line of tunnel." If it meant the entire width of 1,500 feet, it meant a practical veto on all prospecting. If it meant only the width of the tunnel, there was no objection to it, The attention of every mining community was drawn to it. The Department was appealed to, and on September 20th it issued a letter addressed to Hon. Jerome B. Chaffee,* then the delegate from Colorado, and intended to be circulated, and which was circulated, as the

*The full text of the letter is printed on p. 18 of this brief.

official construction of the Tunnel Act. This letter was published in all the papers circulating in the mining districts. To show that it had more than the force of an *ex parte* interpretation, for the benefit of an individual, we will state that so prominent was the part taken by Mr. Chaffee in the passage of this Act that the $100 labor then for the first time imposed became ever since and still is known by the name of "Chaffee work."

This ruling was printed as part of the regular annual report of the Land Office for 1872, and is found in that volume, page 60.

Such interpretation was followed by repeated decisions of the department to the same effect, all confining its width or line to the "width of the tunnel and no more."

Corning Tunnel Co. v. Pell, Nov. 3, 1876, 3 Land Owner, 130;

In re John Hunter, Jan. 16, 1878, 5 Land Owner, 34;

In re David Hunter, Oct. 12, 1878, *Id.* 130.

The *Corning Tunnel case* decided in the Land Department was followed by a contest between the same parties in the Supreme Court of Colorado in 1878, in which they, in terms, define the line of tunnel to be only its width.

In 1882 this point came again before the Land Office in *Bodie Tunnel Co. v. Bechtel M. Co.* 8 Land Owner, 173, where the department repeats its original construction, and cites its confirmation by the judiciary in the *Pell case*.

And so conceded had the point become that the department has never since been called upon to pass upon the question.

The weight to be given to cotemporaneous construction is clearly stated in Sutherland on

Statutory Construction, Sec. 307, and the notes to that section.

In the instance at bar entire mining districts have been developed and property in value to the extent we say, without exaggeration, of the value of hundreds of millions of dollars will be affected by this decision. Scarcely a developed mine in any part of the mining country where the topography invites the running of tunnels but is within reach of the claim of some tunnel. Before this decision a tunnel was considered merely as a means of access to develop a mine. By this decision it is *livery of seizin*, of stronger legal effect than a patent, to give title to that which its owners never before thought of asserting claim to.

3. Effect of the Vestal Patent. Effect of failure to adverse.

The Vestal Lode was discovered and recorded on April 2, 1888. It was a relocation of a claim recorded in 1879 which had been abandoned. It applied for patent and made its entry on June 30, 1890. The Group Tunnel was located in 1887, and was in some unknown distance when the final record of the Vestal was made.

But it was bound to adverse the Vestal, as it had the right to under the practice of the department. *In re Tioga M. Co. & Land Owner, 88; Bodie Co. v. Bechtel Co. Id. 173.*

Or it could stay by injunction the application for patent as had been judicially decided. *Hope M. Co. v. Brown, 28 Pac. 732.*

Not having done so, by what law is it excepted from the effect of a patent.

The only possible answer to this is that the wording of Section 2,323 is an absolute grant of a vested estate in a piece of land 3,000 feet square not to be divested even by patent, to any portion of

that piece of land. Certainly every surface location of a single claim has as broad a grant of all veins apexing within its lines. "Exclusive right of possession" is the language of Section 2,322, referring to such surface locations. But the same vein may be claimed by two surface locations, or by a surface location and a tunnel site. One such claim applies for patent and by statute the other must adverse or forever lose its priority. The application is a summons to all the world to assert rights against the issue of the patent or be forever barred. *Wolfley Co. v. Lebanon Co. 4 Colo. 112; Iron Silver Co. v. Campbell, 135 U. S. 299.*

The only exception of a case which need not adverse is, where two lodes unite as they go down, which the statute provides for in terms, saying that "the prior location shall take the vein below the point of union." That exception is not one which can be extended by analogy to any other case under the mining law.

We assert that a tunnel location must protect its rights either by an adverse or by enjoining the patent proceedings until it has ascertained whether the lode about to be patented would be cut in the tunnel.

The Act says, Sec. 2,325, that every applicant for patent shall give notice of publication for sixty days, and :

"If no adverse claim shall have been filed with the register and receiver of the proper land office, at the expiration of the sixty days of publication, it shall be assumed that the applicant *is entitled to a patent and that no adverse claim exists.*"

The Act of 1872, in one bill, codifies the entire mining law of the United States. All subsequent legislation refers to it and is in the form of amend-

ments to it. The same Act provides for lode claims, placer claims, tunnel claims and mill site claims. Even a mill site has been decided in construction of the Act to be a mining claim. *Hartman v. Smith, 14 Pac. 648.* Provision is made for patenting each sort of claim. If either lode, mill site or placer applies for a patent any conflicting claim of any character must adverse to protect its rights. The language of the Act is sweeping. It uses the words "adverse claim" without limiting the term to any class of claims.

The entire theory of the Act is to ripen possessory or inchoate claims into the security of patented claims. Prior discoveries, equities of the strongest character, are lost by failure to adverse. If they are not wiped out the security of the patent amounts to nothing.

This application for a patent is a proceeding *in rem* and the patent is conclusive against all the world. *420 M. Co. v. Bullion Co. 3 Saw. 634; 11 Mining Rep. 609; Hamilton v. Southern Nevada Co. 33 Fed. 562; 15 M. R. 314.*

Of course we assume that the Court will construe the Act as a whole. It will not say as to a location across the path of a tunnel it shall be invalid because the Act says so; and at the same time treat the words "*shall be assumed that the applicant is entitled to a patent*" as if they meant nothing. Both provisions can be given full force by saying that a tunnel, like any other claim, must adverse to save its rights.

We assume the answer to this to be that the vein is yet a long way ahead and may never be cut. Is that hardship a reason to defeat the security of a patent? Two surface discoveries may be 1,400 feet apart and that much drifting necessary to de-

termine whether they are one—whether any real conflict exists—whether the senior record is in fact attacked by the junior record, but that hardship does not avail to save the senior lode from the effect of a patent to the junior, if the senior fail to adverse.

Besides, if a tunnel has this alleged inchoate right to a vein not yet cut, but is not in position to adverse, the Courts will intervene to protect the inchoate right of the tunnel.

In *Hope Co. v. Brown, 28 Pac., 732*, it was never even intimated that the tunnel could assert rights if ever a patent issued. That was a conceded point. This case is the first to intimate, after twenty-three years of mining litigation, that the inchoate right of a tunnel was not impaired by the patenting of a lode across its line.

The opinion complained of makes a patent void as against a secret equity arising out of a state of affairs existing in *pais* and possibly wholly unknown to the purchasers of the patented title; and makes a general provision of a general Act applying over the entire public domain, to be a better title than the specific grant by metes and bounds of a specific tract.

Against such equities, on general principles, a patent has always prevailed in the Federal Supreme Court.

In *Gregg v. Forsyth, 24 How. 179*, patent was held good for all ground it purported to grant, although it contained a clause based upon a special Act making the grant "subject to the rights of any and all persons" claiming under the Act.

4. The Jumbo 2 ground already located by the Hiawatha, contrary to the authority of the Gwillim v. Donnellan case. Estoppel.

The point of discovery of the lode cut in the tunnel had been already located and patent applied for, without adverse, to the Hiawatha. This makes the decision complained of in opposition to the point decided by the U. S. Supreme Court in *Gwillim v. Donnellan, 115 U. S. 45.* The ruling in that case was that no location could be made on ground already located or patented. Even after location, if the locator allowed his discovery shaft to be patented to a third party, his entire location was destroyed.

The opinion complained of avoids this by saying that the Hiawatha location upon a surface discovery later than the tunnel location was void by the Act of Congress. The Act does not use the word "void." It says such location shall be "invalid." But the Act does not say that a patent issued upon such invalid location shall be either invalid or void. Nor does it prevent the operation of an estoppel where the originally invalid title is bought in by the holder of the hostile equity which made it invalid, and the invalidity has been waived by an election to affirm it by going to patent upon it.

This Point 4 is supported by the same reasoning which we have suggested in aid of the Vestal, but has this further and unique strength:

The Hiawatha was the property of the owners of the Group Tunnel at the time when they made location of the same ground as the Jumbo No. 2. By this purchase of it they estopped themselves from treating it as public domain. They elected to apply for patent upon it as a surface discovery and

location, thus barring themselves from the right to treat it as vacant ground. It being thus their own claim, they attempt to make a second location within their own lines, which the Federal Supreme Court says cannot be done, and which decision has been followed as the settled law. The exact point was decided in *Golden Terra Co. v. Mahler*, 4 Mining Rep. 390, that a second discovery could not be made within the lines of the locator's own prior claim.

Certainly, when they bought that title and affirmed it by asking for a patent, they cannot assert that either the location or the patent should contain an implied exception in favor of themselves as the owners of the Group Tunnel site. An exception of tunnel rights by which they could claim a second patent on the tunnel discovery as excepted out of their first location or patent on the Hiawatha surface discovery would be one operating in their own favor, or, in other words, one carved out of a man's estate for his own benefit.

5. The boundaries of the tunnel claim never defined nor marked upon the ground, and the claim, therefore, void.

It may seem a bold assertion, but we are, nevertheless, justified in stating that the opinion to correct the errors of which we ask the writ of *certiorari*, gives to the tunnel claimants just double what they have ever before claimed. Well may they, like Lord Clive, be astonished at their own moderation.

In every tunnel location in the books the location notice, or record, had claimed a specific number of feet on each side of the tunnel. In the *Glacier case, 127 U. S. 472*, it was 250 feet on each side. In the *Hope case* it was 300 feet on each side, 28 Pac.

73. In the *Bodie case, 8 L. O, 173,* it was 750 feet on each side.

In every instance the tunnel locator had conceded that he must at the outstart mark the defines of his claim, as is required by the distinct language of the statute as to every mining claim, that its "location must be distinctly marked on the ground, so that its boundaries can be traced." Such is the language of what printed forms are in the books for tunnel locations, and it was never before even asserted that a tunnel could stake off its line proper of the width of four feet, and assert rights *in terrorem,* for 1,500 feet on each side of that line. This Group tunnel was staked only as a mathematical line along its proposed bore. Record page —. Its limit of claim on each side was not staked.

We further desire to disabuse the Court of all prejudgments towards the equity of the case, which seem to have and always should have, where proper facts exist, some potency to decide doubtful points.

A tunnel has absolutely no equity. It is not a means of discovery. Mining value is always known in advance by the labor of the surface prospector. A tunnel is never driven into a hill until it is known, not doubtfully but absolutely, that mineral lies across the path of the tunnel. In the case at bar the mineral value of Telescope Mountain was known for years before the location of this Group tunnel. True it is that particular isolated veins may escape surface discovery and be caught as the tunnel progresses, but such discovery is only accidental. In other words, conceding to every tunnel its rights, whatever they may be, there is nothing in the history of mining by tunnel to justify the consideration of a tunnel as entitled to the rewards

of a prospector. It is only used to monopolize the entire mineral area of the neighborhood. And in this instance another tunnel located by the same parties, on the same day, on the same hill, stands ready to seize what the Group tunnel may allow to escape.

6. The facts were in issue but not considered by the Circuit Court of Appeals.

The conclusions reached by the Court are based upon the assumption of the truth of appellant's answer without reference to the facts disclosed by the record, and in apparent disregard of the issue tendered by the replication. If we correctly apprehend the opinion, this was done because of some expressions made by the Circuit Court in the opinion reported in *53 Federal, 323*, to the effect that conflicts of testimony concerning the form and position of ore bodies are to be determined by a jury.

The opinion of JUDGE HALLETT as reported, was announced after the argument of three distinct cases against the appellant, and involving controversies relating respectively to the Vestal, Contention and Compromise lode mining claims. It related to and embraced them all. It was announced on December 22, 1892. Precisely five months afterward and on May 22, 1893, (p. 67 *et seq.* of printed transcript) the parties hereto, by their respective counsel, for the purpose of getting the *entire question* before said Court, that their rights might be fully and finally determined, stipulated that the record might contain certain affidavits, documents and maps therein mentioned, and which stipulation was made the basis of the decree which on that day was entered (p. 278, printed transcript).

By that stipulation the parties agreed that "the case shall be determined and final decree entered therein, subject to the right of appeal, upon the issues as joined upon the bill and cross-bill and upon the affidavits and documentary evidence hereinafter mentioned, which shall be taken and considered *for all the purposes of said cause* as if the evidence had been regularly taken before the Master and as if the witnesses who had made affidavits had personally appeared and been examined and cross-examined." (p. 67.) It was also agreed "that nothing in the opinion should be considered or taken as a finding of fact to the effect that the Vestal location was prior in date to the location of the Group Tunnel site." (p. 70.) The decree recites that the cause "came on to be heard upon the bill, answer and replication, together with affidavits and documentary evidence in support thereof;" "that the same was fully considered," etc.; and the Court "doth find the issues therein joined *on said bill, answer and replication* for the complainants," etc. (p. 278.)

Whatever expression the opinion of Dec. 23, 1892, may contain, the decree in the cause as rendered was upon the entire record, and by the stipulation all the facts were before the Circuit Court of Appeals for review. If that is not true, if the stipulation is of no force for us, it certainly should not have been used against us. If the opinion is to be the thing reviewed, and the answer, assumed to be true, is to be taken in connection therewith and that alone, then we must insist that the appellant cannot claim the Vestal location to be junior in date to the Group Tunnel site, for the opinion states the contrary to be the fact. Both counsel and Court must come to the stipulation and

the record of facts to secure the material essential to the overthrow of this condition, which, if true, enables us to concede all that the Court has said and yet exclude the appellant from our premises. *Expressio unius est exclusio alterius.* The care with which appellant guarded itself in the stipulation from the consequences of the deduction from the record that the Vestal was senior in date and, therefore, superior in right to the Group Tunnel site, conclusively establishes the proposition that but for its exclusion by the agreement, the fact would have been a controverted one; and that the facts as well as the law were to be submitted to the decision of the Court of Appeals. If, on the other hand, the evidence is given due importance in reaching a conclusion as to the rights of the parties, the unsoundness of the appellant's contention becomes equally clear. That it never discovered the Jumbo No. 2, that its tunnel was never held for anything save as an entrance and exit to its mines, that there is no Jumbo 2 vein as separate and distinct from the great horizontal vein underlying the mountain, that its witnesses practically concede every important physical fact for the truth of which we contend, that Jumbo 2 was a fraud in its inception and consummation cannot be denied by any impartial mind which analyzes and reviews the record as a whole. Questions of fact in actions relating to real estate titles are properly cognizable by a jury, yet adverse suits brought under section 2325-2326 R. S. of U. S. to determine the right of possession to mining claims may be brought in equity as well as in law.

Doe v. Waterloo Mg. Co., 43 Fed. 219.
Wolverton v. Nichols, 119 U. S. 488.

And it is unquestionably the law that if the facts appear so plain in an equitable proceeding as

that a verdict against them would not be sustained upon a motion for a new trial, the parties will not be required to go through the useless form of a jury trial in order that equity may determine the extent to which it should grant or refuse relief.

In the argument of the case we asserted the doctrine that if the judgment or decree of a Court was correct it mattered little whether the process of reasoning upon which it was based was sound or unsound. We beg leave to again assert it. We submit that the language of a decree is conclusive as the basis upon which it was rendered, and since ours expressly recites that it is the result of all the pleadings and all the evidence of both parties, it should not be overthrown upon a consideration of the remarks of the judge who rendered it and of the recitals of the answer of the party which challenges its accuracy.

For the reasons assigned, we respectfully ask this Honorable Court to grant a writ *Certiorari* to the Circuit Court of Appeals.

CHAS. J. HUGHES, JR.

CHAS. S. THOMAS.

R. S. MORRISON.

Solrs for Petitioners

DENVER, COLORADO, April 26, 1895.

We, the undersigned counsel for appellee, "The Rico-Aspen Consolidated Mining Company," certify that in our judgment and opinion the foregoing Petition for *Certiorari* is well founded, and that the points therein are well taken, and that the same is presented in good faith and in order that there may be a full discussion of the points therein specified, and not for the purpose of delay.

Charles J. Hughes Jr.

Charles S. Thomas

Robert W. Morrison

Attorneys of the Supreme Court of the United States.

EXHIBIT I.

Letter cited on page 3.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE.

WASHINGTON, D. C., Sept. 20, 1872.

Hon. J. B. Chaffee, D. C., Denver, C. T.,

SIR:—In response to your letter of the 13th instant, desiring the construction of this office of the clause in the mining act of May 10th, 1872, relative to tunnels. I have the honor to state that the interpretation uniformly given by this office to the fourth section of said statute may be found under the head of Tunnel "Rights," commencing on page eight of circular herewith dated 10th June, 1872, from which it will be perceived that the *line* of the tunnel is held to be the *width* thereof and no more, and that upon *this line* only is prospecting for blind lodes prohibited while the tunnel is in progress, and that right is granted to the tunnel owners to fifteen hundred feet of each blind lodes not previously known to exist which may be discovered *in such tunnel* but that other parties are in no way debarred from prospecting for blind lodes or running tunnels so long as they keep without the *line of the tunnel* as herein defined; the said line being required by our regulations to be marked on the surface by stakes or monuments placed along the same from the face or point of commencement to the terminus of the tunnel line aforesaid.

When a lode is struck or discovered for the first time by running a tunnel, the tunnel owners have the option of recording their claim of fifteen hundred feet all on *one* side of the point of dis-

covery or intersection, or partly on one and partly upon the other side thereof; but in no case can they record a claim so as to absorb the actual or constructive possession of other parties on a lode which had been discovered and claimed outside the *line* of the tunnel before the discovery thereof *in* the tunnel.

I am, sir, very respectfully,

Your obedient servant,

WILLIS DRUMMOND,

Commissioner.

Office Supreme Court U. S.
FILED.
MAY 10 1895
JAMES H. McKENNEY,
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

THE RICO-ASPEN CONSOLIDATED MINING COMPANY *et al.*, *Petitioners*,
vs.
THE ENTERPRISE MINING COMPANY, *Respondent*.

No. 1000

267

Argument in Behalf of Respondent,

OPPOSING THE ISSUANCE OF A WRIT OF CERTIORARI.

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CLARK & REID, PRINTERS, 1335 LAWRENCE ST., DENVER.

IN THE

SUPREME COURT OF THE UNITED STATES.

THE RICO-ASPEN CONSOLIDATED MINING COMPANY *et al.*, *Petitioners*, vs. THE ENTERPRISE MINING COMPANY, *Respondent.*		No.

Argument in Behalf of Respondent,

OPPOSING THE ISSUANCE OF A WRIT OF CERTIORARI.

Section 6 of the Act of Congress approved March 3, 1891, establishing Circuit Courts of Appeal, provides, *inter alia*—

That in any case in which the judgment of the Circuit Court of Appeals is made final, the Supreme Court may require, by *certiorari*, or otherwise, any such case to be certified for its review and determination, with the same power and authority in the case as if it had been brought before it by appeal or writ of error.

But for this statutory provision, no grounds whatever are stated upon which to base the application for the writ. For the settled rule of the common law seems to be that the only office of a writ of *certiorari* is to bring up the record of the proceedings of an inferior tribunal for the purpose of enabling the Court of review to deter-

mine whether the former has proceeded within its jurisdiction, and not to correct mere errors in its proceedings.

Folger, J., in People vs. Betts, 55 N. Y., 600.

American Construction Co. vs. Jacksonville T. and K. W. Ry. Co., 148 U. S. 372.

The statute, however, seems so far to have enlarged the office of the writ as to render it competent for this honorable Court, in the exercise of its judicial discretion, to require the record in any case in which the judgment of a Circuit Court of Appeals is by the act of its creation made final, to be certified up and to review and revise the judgment or decree thereof in the same manner as if the case had been brought up by appeal or writ of error. In other words, this Court may, in its discretion, review upon *certiorari* judgments or decrees of a Circuit Court of Appeals by virtue of this provision of the statute, only upon the same terms and under the same circumstances that it may review such judgments or decrees when brought before it for review by appeal, or writ of error. This power of review, both at law and in equity, has always been limited to final judgments.

Accordingly, it has been held by this Court, in effect, that a writ of *certiorari* does not lie for the purpose of requiring to be sent up for review, a judgment of a Circuit Court of Appeals reversing a judgment of a Circuit Court and remanding the case for further proceedings, for the reason that such judgment is not final.

Chicago and N. W. R. Co. vs. Osborne, 146 U. S., 354.

American Construction Co. vs. Jacksonville T. and K. W. R. Co., supra.

These cases seem to us to be decisive of the questions presented by this petition. It appears upon the face of

the petition that the Circuit Court of Appeals reversed the decree of the Circuit Court, and that the sole object sought to be attained by these proceedings is a review by this Court of the entire record in the same manner and to the same extent as if the case had been brought here by appeal.

II.

Although we think that the cases above cited conclusively establish the proposition that the writ should not issue under the circumstances presented by the petition, we, nevertheless, will briefly notice, *seriatim*, the several points urged by the learned counsel for the petitioner.

The first point made is, that the decision of the Court of Appeals is opposed in principle to the opinion in *Erhardt vs. Boaro*, 113 U. S., 527. The extent of the rights of the respondent depends entirely upon the construction to be given to Section 4 of the Act of May 10, 1872, relating to mines, the same being Section 2323 of the Revised Statutes. No such question was before the Court or involved in the *Erhardt* case. For the distinction between the rights of a locator of a lode mining claim made upon the surface, and the rights of a locator of a tunnel claim made for the purpose of discovery, we respectfully refer the Court to the very able opinion of the Circuit Court of Appeals delivered in the case at bar.

III.

The next point made is that contemporaneous construction of the section of the statute under consideration was departed from by the Court of Appeals. The rule which gives weight to contemporaneous construction put upon a statute by those charged with its execution applies only in cases of ambiguity and doubt, and is even

then entitled only to respectful consideration, and is never controlling upon the Courts.

Swift vs. United States, 105 U. S., 691.

Where the language of an Act is so explicit as not to be open to construction, its meaning cannot be changed by the practice of the departments, however long continued.

United States vs. Graham, 110 U. S., 219.

Our contention is that the section under consideration (2323, Revised Statutes) is too clear and explicit to require construction.

Whatever views may have been entertained by the ministerial officers or employees of the General Land Office, we contend that the portion of Section 2323 defining and limiting the extent of the rights of a tunnel owner to veins discovered in his tunnel is too explicit to require construction and too clear to permit of any construction other than the ordinary and natural meaning of the words employed in the statute. The section provides that "The owners of such tunnel shall have the right of possession of all veins or lodes within three thousand feet from the face of such tunnel on the line thereof not previously known to exist discovered in such tunnel to the same extent as if discovered from the surface." By virtue of the provisions of Section 2320 of the Revised Statutes, a mining claim located upon the surface "may equal but shall not exceed one thousand five hundred feet in length along the vein or lode," and by Section 1 of the act of 1874, Session Laws of Colorado (Section 2397 of the General Statutes of Colorado), it is provided, "The length of any lode claim hereafter located may equal but not exceed fifteen hundred feet along the veins."

In the recent case of *Ellett vs. Campbell*, 18 Colo. 523, the extent of the right of possession of a vein cut in a tunnel has been held to be a right to the possession of 1,500 feet in length along the vein, and held to be the same in extent as that of a surface locator. Only in cases where local State or Territorial statutes have expressly limited the right of possession of a vein discovered by a tunnel owner, has it ever been successfully contended that such right of possession along the vein was limited to a shorter distance than 1,500 feet. The decision of the Court of Appeals in the case at bar merely follows the plain and natural meaning of the language employed in the statute.

The judicial branch of the government is alone authorized to finally and authoritatively interpret the laws. This the Circuit Court of Appeals has done, and this Court is now asked, in the exercise of a discretion rarely exercised, to require it to certify up the record of its proceedings in order that this Court may review its construction of a statute because it is claimed that the decision of the Court of Appeals is in alleged conflict with a construction previously put upon it by inferior ministerial officers of the Department of the Interior.

IV.

The 3d point is fully and sufficiently answered by the opinion of the Court of Appeals. (See opinion, page 5, paragraph 3. See, also, the testimony of the witness Newman, printed record, pages 195–201, and, also, the maps found on pages 211 and 223, respectively.) Furthermore, no adverse proceedings can in any case be necessary where the statute under which the location is made declares it to be invalid in certain contingencies.

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The patent when issued confers no greater rights than the law warrants.

V.

The fourth point is also sufficiently covered by the opinion of the Court of Appeals in the following language:

> "Nor can the position that the appellant here acquired no right to the vein in controversy, because its discovery in the tunnel was not upon unappropriated public land, be successfully maintained. This position rests entirely upon the claim that the place in the tunnel where the vein was discovered had been appropriated by the Hiawatha Lode Mining Claim. That claim extended diagonally across the line of the tunnel, and had been located upon the surface after the commencement of the tunnel. It was then located on the line of the tunnel, and was invalid as against the owner of the tunnel by the express terms of the section we are considering. No appropriation of the public land on the line of this tunnel that would deprive the owner of his right to discover and possess this vein could be affected by a discovery and location from the surface after the location and commencement of the tunnel, in the face of the express declaration of this section that such a surface location shall be void."

The opinion in the *Gwillim* case has reference solely to the rights of a surface locator, and has no application whatever to the rights of a tunnel claimant. What the respondent claims, and all that it claims, and what the statute guarantees to it, is "the right of possession of all veins or lodes within 3,000 feet from the face of such tunnel on the line thereof, not previously known to exist, discovered in such tunnel to the same extent as if discovered from the surface."

It does not seek to disturb the rights claimed by the owners of a surface mining claim located long after the location of the tunnel claim, as to any part of the vein claimed to have been discovered by the surface locator,

and which was the basis of the surface location, viz, the Vestal claim.

The respondent seeks only to maintain its "right of possession," of the Jumbo No. 2 vein, discovered and cut in the Group Tunnel, and which vein is a "cross-vein" to the Vestal vein. The locators of the Vestal claim, made that location substantially parallel to the Group Tunnel, and under a permissive statute which declares in clear, explicit terms, that "locations on the line of such tunnel of veins or lodes, not appearing at the surface made by other parties after the commencement of the tunnel, and while the same is being prosecuted with reasonable diligence, shall be invalid."

Sec. 2323, *U. S. Revised Statutes.*

VI.

It is a sufficient answer to the fifth point to say that the statute does not require the boundaries of a tunnel claim to be marked upon the ground, and that no Court has ever so held. On the contrary, the Supreme Court of Colorado, in the case of *Ellett vs. Campbell*, 18 Colo., on p. 521, say:

"Section 2323 does not provide that the discoverer of a vein in a tunnel shall make a surface location thereof; but it does declare that locations made by other parties on the line of such tunnel shall, under certain circumstances, be invalid. Thus the purpose of Congress to protect the discovery of veins or lodes in tunnels is clearly manifest. In view of the purpose and language of the several enactments relating to the discovery and location of mineral lodes and the consequences which would flow from a different construction, we feel constrained to hold that when a tunnel owner has duly located his tunnel claim, and thereafter discovers a mineral lode therein, according to all the conditions specified in Section 2323, he is not bound to make another discovery and location of the lode from the surface, in order to be protected against a subsequent surface locator of the same lode. Thus, we interpret the section to

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mean what its special words plainly import, without unnecessarily qualifying their meaning by the general language of other sections."

VII.

The sixth and last point is that "*The facts were in issue, but not considered by the Circuit Court of Appeals.*"

In the view taken of the case by that Court, this was not only unnecessary, but would have been highly improper. The Circuit Court was controlled in its decision by the assumption that the Territorial Act of 1861 was still in force, and fixed the rights of the parties. The Court of Appeals was of the opinion that such act was repugnant to the Act of Congress of May 10, 1872, and also to a subsequent Act of the Territory of Colorado. *Session Laws of Colorado*, 1874, page 185, *et seq.* *Mills' Annotated Statutes*, Sections 3148–3154. In this as in other respects it was in accord with the decision of the Supreme Court of Colorado in *Ellett vs. Campbell, supra.* Inasmuch as the Circuit Court had proceeded upon a wrong theory, it was necessary to remand the cause for further proceedings, which it did with permission to the parties to introduce new evidence and even to submit certain of the issues to a jury. The Court prefaced its opinion, among others, with the following statement:

"This decree was rendered on the theory that The Enterprise Company could not maintain its claim to the ore here in question, if the allegations of its pleadings were conceded to be true. The decree, therefore, has the effect of a decision sustaining a demurrer to the pleadings of the appellant. (*Enterprise Mining Company vs. Rico-Aspen Consolidated Mining Company*, 53 Fed. Rep., 321.) It may be that, upon the subsequent trial of the issues of fact in this case, the Court below, or the jury to which it may remit these issues, will find them otherwise than as we assume them to be in the decision of this case. It is not intended to determine such issues here. We

must consider the case on the assumption that the allegations of the pleadings of the appellant are true."

The case was fully considered by the Circuit Court of Appeals, and, in our opinion, was rightly decided. If it be true that the act of the Territorial Legislature of Colorado of 1861 was not in force when the location of respondent's claim was made, and this has been determined by the Supreme Court of Colorado in the recent case of *Ellett vs. Campbell*, above cited, it followed that the cause was heard and determined upon a wrong theory and that it was necessary to remand it to the Circuit Court for further proceedings. Counsel will hardly attempt to sustain the position of the Circuit Court with reference to said act. It will be noticed that they have made no serious attempt to do so in the brief which they have filed in support of their petition. That question they pass over in silence. The cause should now be allowed to go back to the Circuit Court for further proceedings as ordered by the Circuit Court of Appeals. When it shall have been there again finally determined, an appeal will again lie to the Circuit Court of Appeals. The petitioner may or may not then have cause to complain of its judgment.

Even if this were a case in which an appeal would lie to this Court, it is clear that no appeal would lie from the Circuit Court of Appeals, reversing the decree of the Circuit Court and remanding the cause for further proceedings. To our minds, the same rule applies with even stronger force to applications of this character. Certain it is that no such grave public questions are involved in this cause as were involved in the cases of *Lau Ow Bew* and *Cunard Steamship Co. vs. Fabre*, the only cases in which such a writ has been granted, though many have been applied for, as stated by Mr. Justice Gray in the

American Construction Co. case, supra. We respectfully submit that the application for the writ should be denied.

J. F. VAILE,
CHARLES H. TOLL,
Attorneys for Respondent.

HENRY M. TELLER,
EDWARD O. WOLCOTT,
Of Counsel.

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UNITED STATES OF AMERICA.

Office Supreme Court, U. S.
FILED
APR 3 1897
JAMES H. McKENNEY,
CLERK.

IN

THE SUPREME COURT

THE ENTERPRISE MINING COMPANY,
Appellant,
vs.
THE RICO-ASPEN CONSOLIDATED MINING COMPANY, *et al,*
Appellees.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

267

BRIEF FOR APPELLANT, THE ENTERPRISE MINING COMPANY.

J. F. VAILE,
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HENRY M. TELLER,
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C. J. KELLY, Printer, Denver.

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BRIEF FOR APPELLANT, THE ENTERPRISE MINING COMPANY.

STATEMENT.

The Enterprise Mining Company was appellant in the appeal from the Circuit Court for the District of Colorado to the United States Circuit Court of Appeals for the Eighth Circuit.

By the decision of the United States Circuit Court of Appeals said cause was determined in favor of the appellant, The Enterprise Mining

Company, the decree of the lower Court being reversed and the cause remanded for further proceedings, not inconsistent with the opinion of the United States Circuit Court of Appeals.

The appellees have brought the case to this Court upon writ of *certiorari* for a review of the proceedings and determination in the United States Circuit Court of Appeals for the Eighth Circuit.

The Enterprise Mining Company, appellant, contends that the decision of the Circuit Court of Appeals is correct, and should be affirmed by this Court.

The facts necessary to an understanding of the questions of law that are to be discussed may be stated as follows:

The Group Tunnel Site, under which the appellant claims the right to the ores in controversy, was located on July 25, 1887, and the certificate of location was filed in the office of the county clerk and recorder of the county in which the location was made on the twenty-ninth day of August, 1887 (See printed record, pp. 213-15.)

The Vestal lode mining claim, under which the appellees claim title to the ore in controversy, is based upon a discovery alleged to have been made on March 23, 1888. The claim was located on April 2, 1888, and the location certificate, therefore, was filed for record on April 3, 1888 (See printed record p. 218).

It was erroneously alleged in the bill of complaint that the discovery of the Vestal vein was made in 1879, and in the opinion of the trial Court appearing in the 53d Federal Reporter, page 321,

the Court fell into the same error. This, however, was corrected by a stipulation, found at page 61 of the printed record, which reads as follows:

"AND WHEREAS, In a written opinion heretofore filed in this cause, on a preliminary hearing (which opinion is reported in 53 Federal Reporter, at page 321) the date of the location of the Vestal lode mining claim was stated to be in 1879, and of older date than the location of the Group Tunnel; and

"WHEREAS, For the purposes of final hearing and decree, the location certificates of said Vestal lode mining claim and of said Group Tunnel Site, giving the dates of said locations respectively, have been put in evidence under this stipulation.

"NOW, IT IS HEREBY FURTHER STIPULATED AND AGREED, That nothing contained in said opinion shall be construed or taken as a finding of fact, to the effect that the Vestal location was prior in date to the location of said Group Tunnel Site" (Printed record, page 61).

The true date of the discovery and location of the Vestal lode is as given above, and is subsequent to the location and commencement of the Group Tunnel.

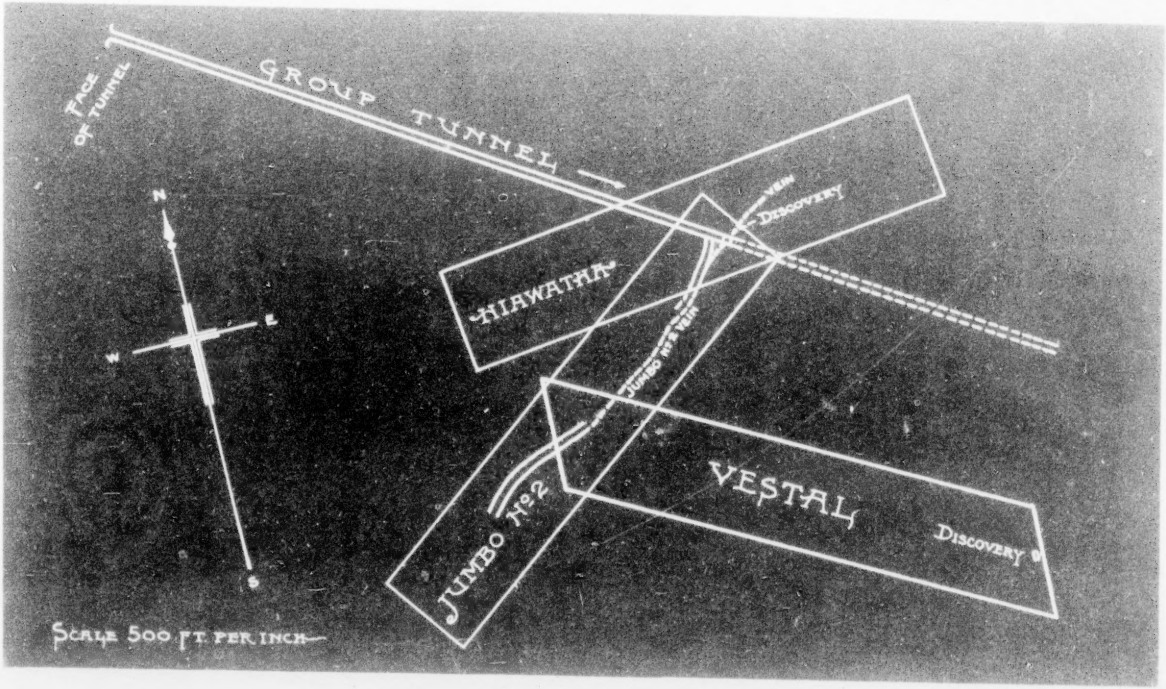
The relative position of appellant's tunnel and the appellees' Vestal lode mining claim will appear by the various maps shown in the record, and especially appellee's map accompanying the affidavit of Mr. Max Boehmer, at page 94 of the printed record; the map accompanying the affidavit of Max Boehmer, L. S. Noble, and others, appearing at page 108 of the printed record, which said last-named map, although purporting to be on a scale of forty feet to the inch, has in printing been reduced, so that it now appears on a scale of about sixty feet to the inch, and also by the map accom-

panying the affidavit of Ellery W. Hunt, shown at page 182 of the printed record. The relative position of the Vestal claim, the tunnel and the vein in controversy appear with substantial accuracy in the blue print here inserted.

The vein in controversy is known as the Jumbo No. 2 vein. It is substantially a vertical vein of the kind known as a blind vein, for it does not appear at the surface, and its top, or apex, is many feet below the surface of the earth. This vein was cut by the Group Tunnel at a point about 1,920 feet from the portal of that tunnel, and was found crossing the line of the tunnel substantially at right angles. The place of discovery of this vein in the tunnel is northeasterly from the Vestal lode mining claim. The same vein, to wit, the Jumbo No. 2 vein, was also opened in underground workings of the appellant, in a claim known as the Jumbo lode mining claim, at a point west of the Vestal lode mining claim, where the vein was found taking a northeasterly course.

At the time of the application for, and the granting of the writ of injunction in favor of the appellees, restraining appellant from working upon this vein, work had been prosecuted from both directions; that is to say, from the point of discovery in the Group Tunnel southwesterly, and from the point where the vein had been opened in the Jumbo claim northeasterly, so that the two workings were approaching each other.

At the time of the hearing in the trial Court there was some difference of opinion among witnesses as to whether the vein discovered in the tunnel, as above mentioned, was the same vein as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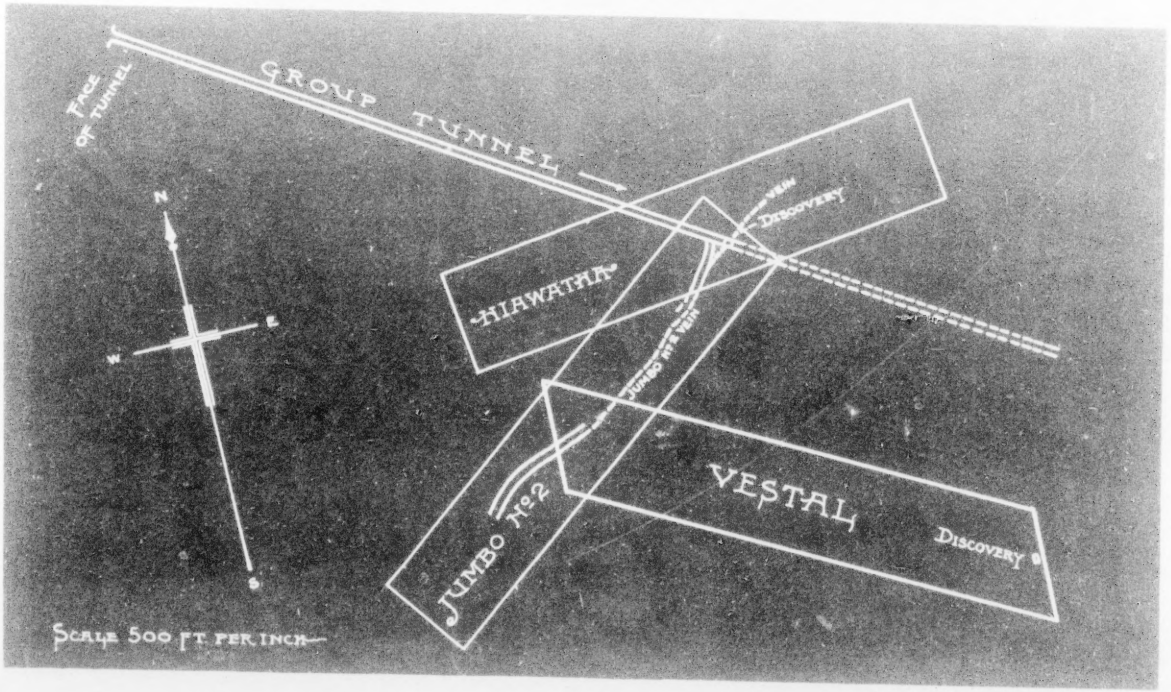
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that upon which work had been prosecuted from the west, as above stated. That has ceased to be a debatable question; but, in any event, the decision of the Court below was based upon the assumption that the two workings were upon the same vein, to wit, Jumbo No. 2 vein.

At the time of the granting of the injunction, the work of appellant, prosecuted eastwardly from the Jumbo claim on the Jumbo No. 2 vein, was distant about 660 feet at right angles from the Group Tunnel on the southwesterly side thereof, and was distant about 685 feet from the point in the Group Tunnel where the Jumbo No. 2 vein had been discovered; all of which will appear by scaling the appellees' map, found at page 94 of the printed record.

The appellant (defendant in the trial Court) claims to be the owner and entitled to the possession of the Jumbo No. 2 vein, to the extent of 1,500 feet thereof, which 1,500 feet it elected to locate 54 feet northeastly and 1,446 feet southwesterly (designating specifically the course by degrees and minutes) from the discovery point in the Group Tunnel.

This contention of appellant is based upon the Revised Statutes of the United States, Section 2323, which reads as follows:

"Where a tunnel is run for the development of a vein or lode, or for the discovery of mines, the owners of such tunnel shall have the right of possession of all veins or lodes within 3,000 feet from the face of such tunnel on the line thereof, not previously known to exist, discovered in such tunnel, to the same extent as if discovered from the surface; and locations on the line of such

tunnel of veins or lodes not appearing on the surface, made by other parties after the commencement of the tunnel, and while the same is being prosecuted with reasonable diligence, shall be invalid; but failure to prosecute the work on the tunnel for six months shall be considered as an abandonment of the right to all undiscovered veins on the line of such tunnel."

Work had been prosecuted with diligence upon the Group Tunnel from the time of the opening thereof in July, 1887, down to the date of this controversy. The trial Court held that the limit of the right of the owner of a tunnel to veins discovered therein related back to the time of the location of the tunnel, but that in extent the right was limited to 250 feet on each side of the center line of the tunnel. The Court based this decision upon an act of the General Assembly of the Territory of Colorado, passed in 1861, and appearing in the General Statutes of the State of Colorado, as follows:

"Section 2390. Any person or persons engaged in working a tunnel, within the provisions of this chapter, shall be entitled to two hundred and fifty feet each way from said tunnel, on each lode so discovered: *Provided*, they do not interfere with any vested rights. If it shall appear that claims have been staked off and recorded prior to the record of said tunnel, on the line thereof, so that the required number of feet cannot be taken near said tunnel, they may be taken upon any part thereof where the same may be found vacant; and persons working said tunnel shall have the right of way through all lodes which may lie in its course."

As it was very clear, and is admitted, that that portion of the Jumbo No. 2 vein, on which the ap-

pellant was working within the Vestal boundaries, was more than 250 feet away from the center line of the Group Tunnel, the trial Court granted the injunction, made the same permanent and entered a decree in favor of the appellees.

The appellant contended that the Act of 1861 had been, in effect, repealed by an act of the territory of Colorado, enacted in 1874, following the Act of Congress of May 10, 1872. On appeal the United States Circuit Court of Appeals for the Eighth Circuit sustained the contention of the appellant in this particular.

The appellees, as we understand, contend that Section 2323 of the Revised Statutes of the United States, known as the Tunnel Act, does not give to the appellant any right, outside of the actual bore of the tunnel, upon any vein which is within territory appropriated by others, although such appropriation was subsequent to the commencement and location of the tunnel-site, and that, in any event, the right of the tunnel claimant upon any such vein cut by the tunnel will not extend to a distance exceeding 750 feet on each side of the center line of the tunnel. It should be noted, in passing, that if the limitation of 750 feet on each side of the center line of the tunnel be fixed as marking the maximum limit to which the tunnel claimant may follow a vein discovered in his tunnel, yet the effect of such limitation would be to sustain the decision of the United States Circuit Court of Appeals as to this particular case, for the reason, as above indicated, that the work which was in progress at the time of the decree, and to which the injunction related, was

within a distance of 750 feet from the line of the tunnel. It will be found by scaling the map (printed record p. 94) that the point where the Jumbo No. 2 vein, coming from the west, crosses the end-line of the Vestal lode mining claim, is distant only 765 feet from the point of discovery of that vein in the tunnel; that only fifteen feet, therefore, of the level which had been run on that vein within the Vestal territory would be beyond such maximum limit of 750 feet from the center line of the tunnel. As to any ore extracted from that fifteen feet the remedy would be an action at law for the ore extracted, and not in equity to restrain the further development of the vein by the appellant in the vicinity of winze A (map p. 94), which was the place where work was in progress at the time of the issuance of the injunction in this case.

Attention should further be called to the fact that the location of the Vestal lode mining claim, U. S. Survey No. 6,252, is substantially parallel with the line of the Group Tunnel, the northeast sideline of the Vestal claim being about 515 feet distant from the center line of the tunnel. The Vestal lode mining claim is now a patented claim, but was not, however, based upon a discovery of ores, mineral in or near the Jumbo No. 2 vein, but on the discovery of mineral in some other vein; the "Discovery Shaft" of the Vestal is within ten feet of the east end-line of that claim, and more than 1,450 feet east of Jumbo No. 2 vein; the course of the Jumbo No. 2 vein is such as to cross the Vestal lode mining claim diagonally through the northwest corner, entering from the northeast across the

northeast side-line and passing out of the west end-line of the Vestal claim.

The United States Circuit Court of Appeals for the Eighth Circuit, sustained the following propositions, all of which were contended for by the appellant, The Enterprise Mining Company, to wit:

1. From the time of the location and commencement of his tunnel, under Section 4 of the Act of May 10, 1872 (Revised Statutes United States, Section 2323), the tunnel owner has the inchoate right to the possession of 1,500 feet along every blind vein or lode which shall be discovered on the line thereof within 3,000 feet from the face of such tunnel, which was not known to exist when the tunnel was located and commenced, provided he diligently prosecutes his work upon the tunnel from the time of the commencement thereof.

2. No discovery or location of such a vein or lode made by others subsequent to the location and commencement of a tunnel can deprive the tunnel owner of his right thereto, if he diligently prosecutes work upon his tunnel.

3. The limitation of the tunnel claimant's right upon veins discovered in his tunnel to 250 feet on each side thereof, imposed by Section 5 of the Colorado Act of 1861, was removed by the Act of Congress of May 10, 1872, and the Act of the Legislature of Colorado of 1874.

4. The tunnel claimant, upon discovering such blind lode in his tunnel, is entitled to the possession of any 1,500 feet, in continuous length, along such lode or vein, which includes his point of discovery in the tunnel.

5. Under the circumstances of this case there was no duty upon the part of the tunnel claimant to file or prosecute an adverse claim against the Vestal lode mining claim, the application for patent for the latter claim having been initiated and prosecuted to final receiver's receipt before the discovery in the Group Tunnel of the Jumbo No. 2 vein.

ARGUMENT.

I.

The tunnel owner's right to blind veins intersected by the line of his tunnel dates from the time of location and commencement of the tunnel.

We use the term "blind veins" as synonymous with the words of the statute, "veins not appearing at the surface," and veins not known to exist previous to the location and commencement of the tunnel.

We shall hereafter discuss the nature and extent of the rights given to the tunnel owner by Section 2323 of the Revised Statutes of the United States. But, whatever those rights are, it is essential to know the date to which they must be referred; and, we insist, that that date is the date of the location and commencement of the tunnel, and that from that time the tunnel owner has an inchoate right to all veins that shall thereafter be discovered in the prosecution of his tunnel, provided he carries on his work with reasonable diligence.

The statute defining the rights of the tunnel

owner may be divided into three separate propositions, each one of which furnishes evidence in support of our present contention.

1. "The owners of such tunnel shall have the right of possession of all veins or lodes within 3,000 feet from the face of such tunnel, on the line thereof, not previously known to exist, discovered in such tunnel, to the same extent as if discovered from the surface."

2. "Locations on the line of such tunnel of veins or lodes not appearing on the surface, made by other parties *after the commencement of the tunnel*, and while the same is being prosecuted with reasonable diligence, shall be invalid."

3. "Failure to prosecute the work on the tunnel for six months shall be considered as an abandonment of the *right* to all *undiscovered* veins on the line of such tunnel."

By the first clause, the right to the possession of all veins or lodes within 3,000 feet from the face of the tunnel, measured on the line thereof, is given to the owner of the tunnel, provided they were not previously known to exist, and provided such veins are discovered in the tunnel. As this is a right given to induce the tunnel locator to prosecute his work, it would seem apparent that the words "not previously known to exist," mean not known to exist previous to the commencement of the tunnel. This meaning, however, is made indisputable by the following clauses; for in the second clause of the statute there is a provision that if locations of such veins are made on the line of the tunnel, "*after the commencement of the tunnel*, and while the same

is being prosecuted with reasonable diligence, they shall be invalid."

The first clause gave the right to the tunnel owner. The second clause made invalid the claim of an outsider. Both clauses refer to veins or lodes which shall be intersected by the line of the tunnel; and the use of the very words, "after the commencement of the tunnel," in the second clause, clearly indicates that the statute intended, by the first clause, to date the rights of the tunnel locator from the same time, to wit, the commencement of his tunnel. The third clause makes even more conclusive, if there were any room for doubt, the validity of this contention; for, referring again to the rights of the tunnel owner, a neglect on his part to prosecute work for six months is to be considered as an abandonment of *the right* to all *undiscovered* veins on the line of such tunnel.

By using the expression, "the right to all undiscovered veins," there is clearly indicated a right of some sort which exists prior to the finding of the vein in the tunnel; but that right cannot find its origin at any intermediate point of time; it must be either at the date of the discovery of the vein or at the date of the location and commencement of the tunnel. If it were the former, then the last clause of the statute has no meaning, for the right would only arise when the vein was discovered, and it would not be a right to an undiscovered vein. The only possible point of time to which this last clause can refer as the date for the origin of the right, must be the date of the commencement of the tunnel, when those proceedings are initiated upon which the owner is basing his claim.

Under the conditions named in the last clause, the tunnel locator is deemed to have abandoned "the right to all undiscovered veins." How can a right be abandoned if it never existed? If the right arises only at the date of *discovery* of a vein, what is meant by the right to *undiscovered* veins? If there is granted a right to undiscovered veins, to what date can that right be ascribed other than the date of the tunnel location?

The few judicial decisions construing this statute up to the present date sustain this contention. In a case decided in Idaho in 1888, this language was used:

"It seems evident from this enactment that Congress intended to withdraw from exploration for lodes not appearing on the surface, so much of the public domain as lay upon the line of such tunnel, and to reserve such for the benefit of the proprietor of the tunnel, so long as he prosecuted work thereon with reasonable diligence, and to give to him the right of possession for this purpose."

Back vs. Sierra Nevada Con. Min. Co., 17 Pac. Rep., 83, 85.

The Supreme Court of Montana, speaking of locations made by others than the tunnel owners, on either side of the line of the tunnel, use this language:

"Of course, any locations so made are at the risk of the locators, for, upon the discovery of the vein or lode in a tunnel, all locations made subsequent to the *commencement of the tunnel* become invalid, if they are within 300 feet on either side of the vein or lode and within 1,500 feet as located along the vein or lode discovered."

Hope Mining Co. vs. Brown, 7 Mont., 550, 557.

In a later decision the Supreme Court of Montana used this language:

"But has he [the tunnel owner] not an inchoate right in such veins, which right is kept alive by prosecution of work on the tunnel, according to law? This seems to be implied by the last clause of statute, that 'failure to prosecute the work on the tunnel for six months shall be considered as an abandonment of the right to all undiscovered veins on the line of the tunnel.' The fact that said non-action on the part of the tunnel claimant should constitute an abandonment shows that it was the intent of Congress to reserve such lodes *from the commencement* of the tunnel, while it was prosecuted according to law."

Hope Mining Co. vs. Brown, 11 Mont., 370 383.

In the case at bar the trial court, while unduly limiting, as we contend, the extent of the tunnel claimant's rights, yet nevertheless recognizes the fact that whatever right to blind veins the tunnel owner may have does date from the time of the location and commencement of the tunnel.

When this case was before the trial court it was considered in connection with two other cases affecting certain claims known as the Contention and Compromise lode mining claims, being claims situated between the line of the tunnel on the one side and the Vestal lode mining claim on the other. The Court used this language:

"But respondents aver that Jumbo No. 2, having been discovered in the Group tunnel, shall have the date of the location of that tunnel, under Section 2323 of the Revised Statutes; and the Group Tunnel was located July 25, 1887, and thus became senior to the Compromise and Contention claims,

which cover the territory contiguous to the line of the tunnel. * * *

"We can only inquire as to the meaning of Section 2323 of the Revised Statutes in respect of the pre-emption of lodes and veins lying in the course of a tunnel, by locating the tunnel and prosecuting work on it in the manner prescribed; and certainly the language of the act, both affirmative and negative, seems to give to the locator some such right. It is first declared that 'the owners of such tunnel shall have the right of possession of all veins or lodes within 3,000 feet from the face of such tunnel on the line thereof, not previously known to exist,' and this is followed by the provision that, 'locations on the line of such tunnel of veins or lodes not appearing on the surface, made by other parties, after the commencement of the tunnel, and while the same is being prosecuted with reasonable diligence, shall be invalid.' Clearly enough, this is a grant of lodes and veins on the line of the tunnel, and the only difficulty is in ascertaining the extent of the grant."

The Court then, after considering the extent of the grant, uses this language:

"If, then, we give effect to Jumbo No. 2 as a discovery in the Group tunnel, under Section 2323 of the Revised Statutes, in connection with the Act of the State of 1861, we are able to give it the date July 25, 1887, when the tunnel was located, and the length 250 feet southwesterly from the tunnel. So understood, it traverses the end of the complainant's Contention claim and a small part of the Compromise claim."

53 Fed. Rep., 321, 325.

While we differ with the trial court as to the extent of our right of possession of the vein in controversy—a matter hereafter to be discussed—yet the Court here fully recognizes our contention that

whatever right we have to a blind vein intersected by the line of the tunnel dates from the time of the location and commencement of the tunnel.

In the case at bar the Circuit Court of Appeals agreed with our contention upon this subject, and expressed the matter, after full argument and consideration very explicitly. Thus, it is said by that Court:

"It is argued that the owner of a tunnel acquires no right to a vein which he finds in his tunnel, when such vein has been discovered from the surface after the location and commencement of the tunnel and before the discovery of the vein therein, because in such a case the vein was 'previously known to exist' when it was found in the tunnel, and hence was not discovered therein. But discoveries from the surface are prerequisites to locations based thereon, and yet this statute makes such locations of veins on the line of the tunnel made by other parties than its owners after its commencement void as against such owners. Thus the statute itself declares that the subsequent discovery and location shall not deprive the owners of the tunnel of their right to the possession of the veins guaranteed to them by the statute, if they afterwards find them in the tunnel—much less can discovery without location have such an effect. From this provision of the statute and the context in which this clause appears, it is clear that the words, 'not previously known to exist,' refer to the time of the location and commencement of the tunnel and not to the respective times of the discoveries of the various veins in the tunnel. It is the right to the possession of veins not known to exist before the owners of the tunnel located and commenced to excavate it, that is secured to them by this statute, if they subsequently find them in their tunnel, and not the right to those only that were not known to exist when they reached them in the tunnel." (Printed record, p. 236.)

And so the Court concludes upon this subject as follows:

"The second clause provides that locations by others on the line of the tunnel after the commencement thereof shall be invalid. Why should they be declared invalid unless to secure to the owners of the tunnel their rights to the veins thus discovered and located by others, until these owners of the tunnel could reach and discover them therein? And the first clause of the section declared that: 'The owners of such tunnel shall have the right of possession of all veins or lodes within 3,000 feet from the face of such tunnel on the line thereof, not previously known to exist, discovered in such tunnel, to the same extent as if discovered from the surface. The guaranty of that clause is plain and certain, and our conclusion is, that from the time of the location of a tunnel under Section 4 of the Act of June [May] 10, 1872, its owner has an inchoate right to the possession of every vein or lode within 3,000 feet from the face of such tunnel, on the line thereof, that was not known to exist when the tunnel was located, and its excavation commenced, contingent only upon the diligent prosecution of the work on the tunnel and the subsequent discovery of the vein or lode therein'" (Printed record, pages 238–9).

We respectfully submit that there is no room for any other contention, and whatever the rights of the tunnel claimant are to blind veins that shall be discovered in the prosecution of his work, those rights relate to the date of the location and commencement of his tunnel, provided his work has been diligently prosecuted.

II.

The tunnel owner can not be deprived of his right of possession of any blind vein intersecting the line of his tunnel by any discovery or location of such vein

made by others after the commencement of the tunnel, provided the work of the tunnel is being diligently prosecuted.

This proposition seems to be a necessary corollary to the preceding discussion. If the right of possession of blind veins discovered in the tunnel relates back to the time of the commencement of the tunnel, then from that date on the right of the tunnel owner is exclusive as to such veins, and the mere fact of discovery or location by another, made outside of the tunnel and after the commencement thereof, could not affect the tunnel owner's rights under the law.

As to locations of a certain character, this is expressly provided by the second clause of the statute already quoted, to wit:

"Locations on the line of such tunnel, of veins or lodes not appearing on the surface, made by other parties after the commencement of the tunnel, and while the same is being prosecuted with reasonable diligence, shall be invalid." (Rev. St., Sec. 2323.)

There are some decisions that give a very narrow and absolutely unwarranted meaning to the word "locations," as used in this clause. Thus, in an early Colorado case, which has ceased, however, to be the law of Colorado, where a lode claim was laid across the line of the tunnel, but the discovery point of the lode claim was about fifty-five feet distant, on one side from the center line of the tunnel, it was held that the location was not on the line of the tunnel, the Court using this language:

"The line of the tunnel being the width of the tunnel, the location (in the same sense that it is

here used, of initial point of location of discovery shaft) of the Slide lode was not on the line of the appellant's tunnel."

Corning Tunnel Co. vs. Pell, 4 Colo., 507–511.

According to that decision, if a lode claim were located across the line of a tunnel, with its discovery shaft absolutely on the center line of the tunnel itself, such location would be invalid. But, with the same boundaries of the lode claim, if the discovery shaft were ten feet off from the center line of the tunnel or not included within the vertical planes bounding the sides of the tunnel itself, such location should not be invalid by virtue of the statute.

We think it very apparent that Congress in passing this act did not intend any such absurd meaning, when it declared locations upon the line of the tunnel to be invalid. The term "location" is used in two senses in the statute: one, meaning the parcel constituting the mining claim; the other, the act of appropriating such parcel so constituting the mining claim. In neither use of the word is it synonymous with "discovery" or "point of discovery." Thus, in the section immediately preceding the one now under discussion, to wit, section 3 of the act of May 10, 1872, (Rev. St., Sec. 2322) we have the word "location" used several times, as indicating a parcel of land with definite boundaries. Thus, the locators of all "mining locations" are given various rights, including "the exclusive right of possession and enjoyment of all *surface* included within *the lines of their locations;*"

also, of all veins the top or apex of which lies inside of said surface lines, extended downward vertically, although such veins or lodes may, in their downward course, so far depart from the perpendicular as to extend outside "the vertical side-lines of such surface locations."

By the same section, the possession of such outside parts of the veins on the dip is confined within vertical planes drawn downward "through the *end-lines* of *their locations*."

In the section following the section under discussion, it is said: "The location must be definitely marked on the ground, so that its *boundaries* can be readily traced." (Revised Statutes, Section 2324).

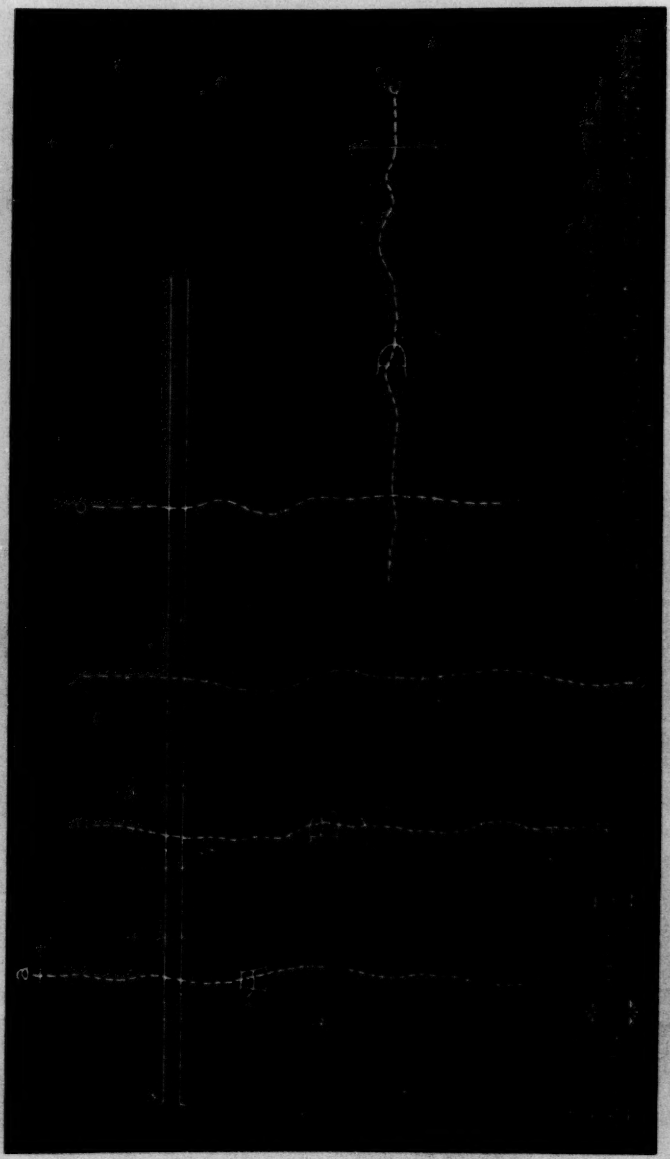
It is very apparent, therefore, that the word "location" refers, not to a point of discovery, but to the parcel of land, with side-lines and end-lines, constituting a mining claim. We cannot give the word in the section under discussion a different meaning from that which is plainly and necessarily attributable to it in the sections immediately preceding and immediately following.

Mr. Morrison, in his valuable work entitled, "Morrison's Mining Rights," (Eighth Edition), at page 30, very properly says:

"The location of a lode consists in defining its position and *boundaries* and in doing such acts as indicate and publish the intention to keep and hold it under the license of the United States. The formal parts of location include: 1. The location notice at discovery. 2. The discovery shaft. 3. The *boundary stakes*."

This Court has said:

"A mining claim is a parcel of land containing



precious metal in its soil or rock. A *location* is the act of appropriating such *parcel* according to certain established rules. It usually consists in placing on the ground, in a conspicuous position, a notice setting forth the name of the locator, the fact that it is thus taken or located, with the requisite description of the *extent and boundaries* of the parcel, according to the local customs, or, since the statute of 1872, according to the provisions of that act."

Smelting Co. vs. *Kemp*, 104, U. S., 649.

We think, therefore, it is very clear that if the mining claim is so located that it lies across the line of the tunnel, then such location is made invalid by the second clause of Section 2323.

It is important, however, to consider some of the various positions which locations may assume, in reference to the line of the tunnel and veins cut therein, for the purpose of determining relative rights.

We insert here a blue print, not representing any specific facts in this case, but used for the purpose of illustration only, in which the claim marked "A" is represented as being located across the line of a tunnel upon a vein intersected by the tunnel; the claim marked "B" is similarly located, except that one end of it overlaps the tunnel; the claim marked "C" has no part of its location upon the line of the tunnel, although its position would be presumptively upon the vein, which, if extended, would cross the line of the tunnel; while the claim marked "D" is represented as being located parallel with the line of the tunnel, and, if it contains any vein which intersects the line of the tunnel, such vein would cross the located claim, passing through its side-lines.

Under the second clause of Section 2323, assuming that the tunnel owner's right is superior as to date, the location of the claim "A" and that of the claim "B" would be absolutely invalid. But what would be the rights of the tunnel claimant as to his veins which run into the claim "C," or the vein which runs into the claim "D?"

As we consider the subject, the second clause of the statute makes the claims "A" and "B," in the supposed case, absolutely invalid as locations. It leaves the locations "C" and "D" valid, but subject to the rights given to the tunnel owner by the first and third clauses of Section 2323.

A reason may well appear for a distinction in the statute as to these claims. Claims "A" and "B" are presumptively upon veins which do cross the line of the tunnel. The claim "C" is presumptively on a vein which, if it continues on its course beyond the end line of "C," might cross the tunnel. The presumption of its doing so is not so strong as in the cases of "A" and "B."

The location of the claim "D," being parallel to the course of the tunnel, is presumptively upon a vein passing through its end lines and running parallel to the tunnel. Presumptively, therefore, it is not laid upon any vein that intersects the tunnel. But if a blind vein is found within claim "D," and this vein crosses the line of the tunnel, then the possession of that vein is, by the first and third clauses of the Tunnel Act, secured to the tunnel owner.

Under this construction of the statute, while the locations "A" and "B" are absolutely invalid, claims "C" and "D" are not, as mining locations, invalid,

but are subject to the rights given to the tunnel owner upon blind veins which shall be found to penetrate these claims, and to also intersect the line of the tunnel. The only question would be as to the extent to which the tunnel owner would have the right of possession of such veins; for, as in the supposed case, they plainly come within the description of the veins, the possession of which is given to the tunnel owner, and as his right relates back to the date of the commencement of his tunnel, then, within the limit of his right, the location of the claim "C" or the claim "D" could not take from the tunnel owner that which the statute gave him, but such locations, while good as to any other veins that might be found therein, would be subject to the tunnel owner's rights as to the particular blind veins which should thereafter be discovered within this tunnel, in the diligent prosecution of his work.

This brings us, then, to a consideration of the extent of the tunnel owner's right of possession, upon any such blind vein that may be discovered in said tunnel in the progress of its excavation. The trial court limited this right to 250 feet in length along the vein on each side of the tunnel, but the Circuit Court of Appeals, supporting the views of the appellant, held the right of the tunnel owner to extend to the right of possession of 1,500 feet along the vein cut in the tunnel.

III.

The limitation of the tunnel claimant's right, upon veins discovered in his tunnel, to 250 feet on each side thereof, imposed by Section 5 of the Colorado Act

of 1861, was removed by the Act of Congress of May 10, 1872, and by the Act of the Legislature of Colorado in 1874.

Up to this point in the discussion the propositions we have asserted are in accordance with the views of the trial court, (Rico-Aspen Cons. Min. Co. vs. Enterprise Min. Co., 53 Fed. R., 321). The trial court, however, was of the opinion that Section 5 of the Colorado Territorial Act of 1861 which has appeared in subsequent compilations of Colorado Statutes, limiting the right of the tunnel owner to 250 feet on each side of his tunnel, on the veins discovered therein, remained in force. That act reads as follows:

"Any person or persons engaged in working a tunnel within the provisions of this chapter shall be entitled to 250 feet each way from said tunnel, on each lode so discovered, provided they do not interfere with any vested rights. If it shall appear that claims have been staked off and recorded prior to the record of said tunnel, on the line thereof, so that the required number of feet can not be taken near said tunnel, they may be taken upon any part thereof where the same may be found vacant; and persons working said tunnel shall have the right of way through all lodes which may lie in its course."

Mills' Ann. Stat., Sec. 3141; Sess. Laws Colo., 1861, p. 166.

Mr. Morrison, in the seventh edition of his "Mining Rights," uses this language concerning the statute here cited:

"A section similar to 3141, above printed, was found in the Territorial Corporation Law, but was repealed when the present corporation law was

adopted. It gave 250 feet on each side of the tunnel to all territorial corporations organized for tunnel purposes.

"We regard this Section 3141 as inoperative in part, if not in whole, except as to the grant of a right of way in its last three lines. It was passed in 1861, long before any congressional attempt to regulate the subject, and could not now be practically enforced."

Morrison's Mining Rights (7th Ed.), p. 157.

We think that an examination of the legislation of Colorado and of Congress upon this subject will clearly and fully support the views which Mr. Morrison expressed in his book. The history of this provision is as follows:

"An Act Concerning Lode Claims," was approved November 7, 1861. (Sess. Laws, 1861, p. 166.) Section 5 of that act was identical with Section 3141 of Mills' Annotated Statutes, above quoted, with the exception that the words "This act" were used, instead of the words "This chapter."

On March 11, 1864, there was approved an act entitled "An Act to Define the Extent of Mineral and Quartz Lodes," which reads as follows:

"That all mineral and quartz lodes hereafter discovered shall cease and terminate, so far as they have any legal existence, at the distance of 800 feet in either direction (on the line of the lode) from the center of the discovery hole." (Sess. Laws, 1864, Chap. 120.)

The Revised Statutes of 1868 exist by virtue of an act entitled, "An Act for revising and consolidating the General Statutes of the Territory of Colorado," which was approved January 10,

1868. This act, in terms, repeals the act of November 7, 1861, above cited and the act of March 11, 1864, above cited, and re-enacts the Tunnel Statute, above quoted, with the single change of the word "act" to the word "chapter." (Revised Statutes, 1868, p. 465.)

By the same revision, in the chapter on Corporations, a similar tunnel provision was made, as to companies. (Revised Statutes, 1868, p. 128; Chapter 18, Section 40.)

By an act approved February 11, 1870, entitled, "An Act for the relief of pre-emptors and locators of veins or lodes of quartz or other rock on the mineral lands of the public domain;" it was provided as follows:

"Section 1. No statutory law of Colorado Territory shall be so construed as to prohibit the location of 3,000 feet or less on any vein or lode in the manner prescribed in Section 4 of an Act of Congress approved July 26, 1866, entitled 'An Act granting the right of way to ditch and canal owners over the public lands and for other purposes; nor to prejudice any rights to obtain patents for the same, as provided in said act.'"

This was all the legislation upon the subject in the Territory of Colorado prior to the act of Congress of May 10, 1872.

The act of Congress, now Section 2320 of the Revised Statutes, provided as follows:

"A mining claim located after the tenth day of May, 1872, * * * may equal, but shall not exceed, 1,500 feet along the vein or lode."

At the next session of the Territorial Legislature, after the enactment of this Federal statute,

there was passed an act entitled, "An Act Concerning Mines," approved February 13, 1874, which in its first section provided as follows:

"The length of any lode claim hereafter located may equal but shall not exceed 1,500 feet along the vein."

Section 7 of the same Act provided as follows:

"Any open cut, cross-cut or tunnel which shall cut a lode at the depth of ten feet below the surface shall hold such lode, the same as if a discovery shaft were sunk thereon, or an adit of at least ten feet in along the lode from the point where the lode may be in any manner discovered, shall be equivalent to a discovery shaft."

Section 18 of said Act provided as follows:

"All acts or parts of acts in conflict with this Act are hereby repealed."

(Session Laws of 1874, pp. 185–190).

The provision above cited from the Revised Statutes of 1868, being Section 40, Chapter 18 of said Revised Statutes, was repealed by an act approved March 15, 1877, entitled, "An Act to Repeal Certain Laws Relating to Corporations," Section 1 whereof provides:

"That chapter eighteen (18) of the Revised Statutes of the Territory of Colorado, entitled, 'Corporations,' * * * * be and the same are hereby repealed."

(Gen. Laws 1877, p. 988.

No subsequent act relating to corporations in Colorado contained any like provision in reference to the extent of the tunnel claimant's rights on lodes discovered in the tunnel. The "General

Laws of the State of Colorado, 1877" are a compilation under the provisions of an Act entitled, "An Act providing for the printing of the Constitution of the United States, the Declaration of Independence, the Enabling Act, and Constitution of the State, together with all the General Laws of this State, in the most convenient and compact form, together with an index to the same," approved March 22, 1877.

Section 4 of this Act makes the publication *prima facie* evidence of the law. Sections 4 and 5 of Chapter 66, on page 627 of this compilation, are exact reprints from the Revised Statutes of 1868, of the corresponding sections concerning tunnel rights above quoted.

"The General Statutes of the State of Colorado, 1883," are also a compilation under an act similar to the one last above cited, and approved February 28, 1883, providing for the printing of the general laws, under the supervision of a Commissioner, and providing as follows:

> "The law and other matters so printed and certified shall be *prima facie* evidence of the originals, in all courts of and tribunals of this State, when so certified," i. e., certified by the Secretary of State.
>
> (General Statutes, 1883, page 5.)

The clause above quoted as to tunnel rights appears in Mills' Annotated Statutes, Vol. 2, p. 1785. This edition of the laws of Colorado was originally a private enterprise. Its preface bears date of December 24, 1890. By an Act, approved April 6, 1891, it was provided that thereafter the same should "be received in all courts and proceed-

ings, and by all officers of this state, as *prima facie* evidence of the originals."

(Session Laws of 1891, p. 367.)

It will be seen, therefore, that this provision as to tunnel rights, under Colorado legislation, has not been re-enacted at any time since 1868, all subsequent publications of our general laws being in the nature of compilations and not enactments.

In view of the foregoing summary of Colorado legislation relating to tunnel rights, we respectfully submit, that even without regard to Federal Statutes, the tunnel provision of the Territorial Act of 1861 has ceased to be law in the state of Colorado. It was in effect repealed, and was certainly rendered nugatory, by the provisions of the Act of February 11, 1870, above quoted.

Under the Territorial Act of 1861, no number of persons could, by association or otherwise, obtain the right to more than 500 feet along the vein, being 250 feet on each side of the tunnel. Under the Act of February 11, 1870, taken in connection with the Federal Statute, mentioned therein (14 Statutes at Large, page 252, Sec. 4), one locator would be entitled to only 200 feet in length along the vein, but an association of persons might be entitled to 3,000 feet along the vein. The law of 1861 and the law of 1870, therefore, cannot stand together, and the latter must repeal the former.

In any event, the law of 1861 must be deemed repealed by the act of February 13, 1874, as being entirely inconsistent therewith, and therefore repealed by Section 18 of the latter act.

Under the Act of February 13, 1874, there could not be obtained under any one location more than 1,500 feet along the vein. One end of a location could not be more than 1,500 feet distant from the other end of the location, but the locator was privileged to take any length he chose, not exceeding 1,500 feet. Under the Tunnel Act of 1861 the possible length along the vein was 500 feet, being 250 feet on each side of the tunnel, but with a provision that if claims had been staked and recorded prior to the record of the tunnel, so that the tunnel locator could not obtain his 250 feet adjacent to the tunnel, then this 250 feet along the vein could be taken upon any part thereof where the same should be found vacant, under which provision the particular 250 feet allowed on one side of the tunnel might, in fact, be situated more than 1,500 feet from the line of the tunnel. No such floating grant is recognized under the Act of 1874. The two statutes are in direct conflict, both as to the length of the grant along the vein and as to the distance from the tunnel within which the right is confined.

We submit, therefore, that the trial Court was wrong in fixing 250 feet on each side of the line of the tunnel as the limit to the extent of the tunnel owner's right of possession of a vein discovered in his tunnel, and we urge that the Circuit Court of Appeals was right in reversing the trial court and in holding that the Act of the Territorial Legislature of 1861 had been repealed by subsequent legislation (See printed record, pages 241–2).

IV.

The tunnel claimant, upon discovering a blind lode in his tunnel, is entitled to the possession of any 1,500 feet, in continuous length, along such lode or vein, which includes his point of discovery in the tunnel.

The language of the statute in reference to the tunnel owner's right, is that he shall have "the right of possession" of each vein or lode discovered in his tunnel, "to the same extent as if discovered from the surface."

This language seems to be too plain to require argument, for the extent to which a locator is entitled to the right of possession of a vein discovered from the surface is well known and cannot be the subject of discussion. Various attempts have been made, however, to evade the plain language of the statute. The trial Court gave a very peculiar meaning to this clause. He said:

> "Looking to the general policy of the government in dealing with its mineral lands, it seems highly improbable that Congress intended to fix the length of a location made upon a discovery in a tunnel, and we are strongly persuaded to say that in this instance, as in others, the matter is subject to local regulation. In this view the words of Section 2323, 'to the same extent as if discovered from the surface,' mean only that the location shall be as good as upon a discovery from the surface."
>
> *Rico-Aspen Consol. Min. Co. vs. Enterprise Mg. Co.*, 53 Fed., 321, 324.

We submit that this is a palpable misconstruction of very plain words in the statute. The words

"to the same extent," wherever used in the act of May 10, 1872, or wherever similar expressions are used, manifestly refer to longitudinal or lateral extent, to the number of feet in length, or breadth or depth, which may be claimed.

The corresponding verb, "extend," is so used constantly. Thus: "No claim shall *extend* more than 300 feet on each side of the middle of the vein, at the surface" (Sec. 2320). Such locator is entitled to all "veins, lodes and ledges, throughout their entire depth, the top or apex of which lies inside of such surface lines *extended* downward vertically" (Sec. 2322), "although such veins, lodes or ledges may so far depart from a perpendicular in their course downward as to *extend* outside the vertical side-lines of such surface locations" (*Ib.*). "Nothing in this section shall authorize the locator or possessor of a vein or lode, which *extends* in its downward course between the vertical lines of his claim, to enter upon the surface of a claim owned or possessed by another" (*Ib.*).

So, the very word "extent" is used in like manner: "Where an adverse claim is filed during the period of publication, it shall * * * show the nature, boundaries and *extent* of such adverse claim." (Section 2326).

This Court, in a remark which was perhaps *obiter*, uses the same meaning for the word "extent" as we are here contending for. Thus, the Court says:

"Under Section 2323, Revised Statutes, the right is given to locate a tunnel three thousand feet from the face of said tunnel, and the right is also given to the lodes discovered in said tunnel,

'to the same extent as if discovered from the surface,' which is three hundred feet on each side of the tunnel."

Glacier Mining Co. vs. Willis, 127 U. S., 471, 481.

In this connection we may be permitted to call attention to a singular inadvertence appearing in the opinion of Mr. Justice Lamar, in the case last cited. The section of the Revised Statutes which the Court must have had in mind is obviously Section 2320, which limits the *width* of lode claims, located at the surface, to three hundred feet on each side of the middle of the vein, at the surface. Doubtless the statement in the opinion written by Mr. Justice Lamar was accidental, as to the number of feet on each side of the *tunnel*, which might be taken; for inasmuch as any vein cut by the tunnel would *cross* the line of the tunnel, the extent of the tunnel owner's right upon such vein would be measured along its course, and would be the number of feet "in length along the vein or lode," to which he would be entitled if he had discovered the vein at the surface. The three hundred feet on each side of the middle of the vein would mark the maximum width of any *surface* claim he would be permitted to locate, under Section 2320.

The significance of the language used by the Court in this connection, however, is that the Court used the word "extent" as indicating the number of feet that may be taken on each side of the tunnel, and not, as suggested by the trial court in this case, that the words "the same extent" mean "as good as" if discovered from the surface.

The extent to which one may have the possession of a vein if discovered from the surface, is determined by Section 2320, and especially by the following clause:

"A mining claim located after the tenth day of May, 1872, whether located by one or more persons, may equal but shall not exceed 1,500 feet *in length along the vein* or lode; but no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located. No claim shall extend more than 300 feet on each side of the middle of the vein at the surface, nor shall any claim be limited by any mining regulation to less than twenty-five feet on each side of the middle of the vein at the surface," etc. (Revised Statutes, Section 2320.)

This Court has in other cases used the term "extent" as indicating the number of linear feet upon the vein which may be taken. Thus, this Court has said:

"The statute allows the discoverer of a lode or vein to locate a claim thereon to the extent of 1,500 feet."

Erhardt vs. Boaro, 113 U. S., 527, 533.

If our use of the word "extent," as used in Section 2323 is right, then there seems to be no need of argument to the effect that what we are entitled to is 1,500 feet "along the vein or lode." Very early in the history of this statute this was the construction of the General Land Office. Thus, Commissioner Williamson said:

"When a lode is struck or discovered for the first time, by running a tunnel, the tunnel owners have the option of recording their claim of *1,500*

feet all on one side of the point of discovery or intersection, or partly upon one side and partly upon the other side thereof."

Corning Tunnel & Reduction Co. vs. Pell *et al.*, 3 Copp's Land Owner, 130, 131.

It is true that in the same decision Commissioner Williamson held as follows concerning the tunnel claimant's rights:

"In no case can they so record a claim as to absorb the actual or constructive claim or possession of other parties on a lode which has been discovered and claimed outside the line of the tunnel, before the discovery thereof in the tunnel."

We think the last clause is palpably erroneous. We have already fully discussed the date to which the rights of the tunnel claimant must be referred. If the last clause had said "before the location and commencement of the tunnel," then in our opinion it would have correctly expressed the law. However, as to the number of feet along the vein or lode which may be claimed by the tunnel owner, we think Commissioner Williamson's decision is plainly right.

If the trial court had not been misled in supposing that the old Colorado statute of 1861 was still in force, he doubtless would have held that the owner of the tunnel was entitled to 1,500 feet along the vein or lode, after cutting the same in the tunnel, as there is no other distance provided by statute or by any local law or regulation, for the length along the vein or lode which may be possessed or enjoyed by the tunnel owner.

In this connection we confidently submit that

no local statute or mining regulation can reduce the length along the vein or lode which the discoverer of a vein or the tunnel owner may possess, below the limit fixed by the Federal Statute.

We admit that local statutes and mining regulations may be made if they are not inconsistent with the laws of the United States. Indeed, as to mining regulations, this is provided by Section 2324 of the Revised Statutes, which says:

"The miners of each mining district may make regulations not in conflict with the laws of the United States, or with the laws of the state or territory in which the district is situated, governing the *location*, manner of recording, amount of work necessary to hold possession of a mining claim, subject to the following requirements, etc."

It will be observed, however, that the rights given by the General Statutes are rights given to the individual citizens of the United States, as is shown by the Revised Statutes, Section 2319. Section 2320, however, says that a mining claim located after the tenth day of May, 1872, "*may* equal, but not exceed, 1,500 feet in length along the vein or lode." When a United States statute says, in reference to the public mineral lands of the United States, that any native or naturalized citizen *may* take 1,500 feet along a vein or lode which he discovers, how can any local statute or mining regulation say that he shall *not* take 1,500 feet? Any local statute or regulation which prohibits the locator from taking all that he pleases along a vein or lode, within the maximum limit, fixed by the Federal Act, of 1,500 feet, would necessarily be void, as being in conflict with the express terms of the Federal Act. There-

fore, the length of 1,500 feet is, so far as relates to claims discovered after May 10, 1872, the only length provided for by statute. And when the same act gave to the tunnel locator the right to the possession of the vein or lode, to the same extent as if discovered from the surface, manifestly it gave, in length along the vein or lode, 1,500 feet, if the tunnel owner should choose to take so much.

This is the view of the matter entertained by the courts which have passed upon this subject. Thus, in a case already cited from Montana, the Court, in speaking of the rights of other locators outside of the line of the tunnel, says:

"Of course, any locations so made are at the risk of the locators, for upon the discovery of the vein or lode in a tunnel, all locations made subsequent to the commencement of the tunnel become invalid, if they are within 300 feet on either side of the vein or lode and within 1,500 feet as located along the vein or lode discovered."

Hope Min. Co. vs. Brown, 7 Mont., 550, 557.

It will be observed that the Court, in this statement, allows to the tunnel owner 1,500 feet in length along the vein, and then allows the full maximum width of 300 hundred feet on each side of the vein, as fixed by Section 2320 of the Revised Statutes.

In the case of Ellet vs. Campbell, in Colorado, the tunnel claimant had asserted his right to a vein intersecting his tunnel, to the extent of 1,500 feet, taking 750 feet on each side of the line of his tunnel. The Supreme Court of Colorado in that case said:

"What is the extent of the tunnel owner's right of possession to a vein discovered in a tunnel?

no local statute or mining regulation can reduce the length along the vein or lode which the discoverer of a vein or the tunnel owner may possess, below the limit fixed by the Federal Statute.

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"What is the extent of the tunnel owner's right of possession to a vein discovered in a tunnel?

The language of the statute is that he shall have the right of possession 'to the same extent as if discovered from the surface.' In our opinion the words 'same extent' mean the same extent 'along the vein or lode.' While the acts of Congress leave the width of mining claims upon the surface subject to local regulations, within certain limits, the length and depth may not be thus regulated. In this case, the location of the tunnel and the discovery of the lode having been made subsequent to the passage of the act of Congress of May 10, 1872, the discoverer was entitled to claim 750 feet of the lode each way from the point of discovery, or, in the language of the statute, '1,500 feet in length along the vein or lode.' Sections 2320, 2322, Revised Statutes United States. Session Laws Colorado, 1874, page 185. General Statutes Colorado, 1883, Section 2397. Morrison's Mining Rights (Seventh Edition), 22, 23.

"In the case of the Glacier Mining Company vs. Willis, *supra*, which was in many respects similar to the present case, the tunnel claimant was restricted to '250 feet each way from said tunnel on each lode discovered,' but in that case the location was made prior to the act of May 10, 1872, regulating the length of mining locations, and so the local laws of Colorado governed as to the length of the claim. Session Laws, 1861, page 166. General Laws, page 627."

Ellet vs. Campbell, 18 Colo., 510, 523.

In view of the statutory provisions upon the subject, it seems to us that the United States Circuit Court of Appeals, in deciding this case, could not have reached any other conclusion than that which it did reach, to wit, that the tunnel owner was entitled to 1,500 feet along the vein or lode cut and discovered in his tunnel.

The appellee claims that in any event, under the location of the Group Tunnel Site, the appel-

lant cannot claim more than 750 feet on each side of the line of the tunnel, upon the Jumbo No. 2 vein cut in that tunnel, and this contention is based entirely upon the decision of this Court in the case of *Erhart vs. Boaro*, 113 U. S., 526.

In the case of *Erhart vs. Boaro*, the claim under discussion was based upon a discovery made at the surface, and the location notice, set up at the point of discovery, and claiming 1,500 feet upon a lode, did not indicate the directions in which the right of possession was asserted. The trial Court in that case held that this omission rendered the notice void. This Court held that the location notice was not void, but that it should be construed, under the circumstances, as claiming 750 feet in each direction from the point of discovery.

We submit that this case does not in any respect control the procedure in the location of tunnel interests, nor limit the extent of the right of possession along the vein in either direction, *provided* that such right of possession is not asserted for a greater distance than 1,500 feet. When the tunnel claimant locates and commences his tunnel, he does not know that he will cut any vein whatever. His labor may be fruitless. He expends his money and labor in running a tunnel, for the purpose and with the hope of discovery. In what direction the vein will run, if he finds one, cannot at that time be determined; but the direction in which the vein may run will determine what he may desire to claim upon it. For example, after penetrating five hundred feet he may cut a vein which intersects his tunnel at an acute angle; to take it in one direction

would take it down the mountain, where a drift run on the level of the tunnel would speedily come to the surface; while, running in the other direction, it would penetrate into the heart of the mountain and gain depth with every foot.

Again—when the tunnel owner finds a vein, he may discover that this vein, on one side of his tunnel line, had been appropriated by others prior to the location of his tunnel, while on the other side of his line of tunnel the existence of the vein may not have been known prior to the time when his rights accrued. But until he finds his vein, in his tunnel, he cannot know of this situation, and it is absolutely impracticable for him, therefore, to determine in advance, on which side of the tunnel he will desire to exercise his right of possession of any vein he may cut.

The tunnel owner cannot know in what direction he will want to claim a vein, until he discovers that vein, and the law manifestly contemplates that he shall have the right to determine the extent of his claim, and whether on one side of his tunnel or the other, when he discovers such vein in his tunnel.

In the case of *Erhart vs. Boaro*, the vein had been discovered, and it was clearly the duty of the locator to determine, having a knowledge of the existence of the vein, how much he would take in one direction, and how much he would take in the other.

The provision of the Colorado Statute upon the subject, is as follows:

"Any location certificate of a *lode claim* which shall not contain the name of the lode, the name of

the locator, the date of location, the *number of lineal feet claimed on each side of the discovery shaft*, the general course of the lode, and such description as shall identify the claim with reasonable certainty, shall be void." (Mills' Annotated Statutes, Section 3151).

Applying *Erhart vs. Boaro* to the case of a tunnel owner, the latter, when he finds his vein, has the same duty resting upon him, and must then assert and define his right of possession, in the one direction or the other, as the topography of the country and the strike of the vein may seem to him to require. But there is nothing in the statute anywhere which requires a tunnel owner, at the time he begins his tunnel, to elect in advance on which side of the tunnel he will elect to take his 1,500 feet or any portion thereof.

This was the construction put upon this statute at a very early date by the Land Department. In a passage already quoted from Commissioner Williamson, it was held:

"When a lode is struck or discovered for the first time, by running a tunnel, the tunnel owners have the option of recording their claim of 1,500 feet on each side of the point of discovery or intersection, or *partly upon one side and partly upon the other side thereof.*"

Corning Tunnel and Reduction Co. vs. Pell et al., 3 Copp's Land Owner, 130.

This matter cannot, it seems to us, be more truly stated than in the opinion of the Circuit Court of Appeals, where it is very concisely expressed as follows:

"It is urged that if the owner of the tunnel is

entitled to the possession of the mineral to the extent of 1,500 feet along the vein or lode, he is nevertheless restricted to 750 feet on one side and the like amount on the other side of his tunnel. This contention finds no support in the laws. Section 4 of the Act of May 10, 1872, as we have held, entitles him to the possession of the vein to the same extent along the vein or lode as if he had discovered it from the surface. If he had discovered it from the surface he could have located his claim upon and could have held (if he had the superior title as the appellant has here) any 1,500 feet along the vein that included his discovery shaft. It follows that the appellant has the right to any 1,500 feet of this vein that included its point of discovery in the tunnel, and that its location and claim of possession of fifty-four feet of the vein northeasterly and 1,446 feet southwesterly of this point of discovery must be sustained." (Printed record, p. 242.)

It will be observed that in this case, immediately after discovering the vein in the tunnel, the tunnel owner did give notice of his claim of possession, to the extent of 54 feet in one direction and 1,446 feet in the other.

V.

In this case there was no duty upon the part of the tunnel claimant to file or prosecute an adverse claim against the Vestal lode mining claim, the application for patent for the latter claim having been initiated and prosecuted to final receiver's receipt before the discovery, in the Group Tunnel, of the Jumbo No. 2 vein.

By inspecting any of the maps shown in the record it will appear that the Vestal lode mining

claim is located substantially parallel to the course of the Group Tunnel. It is a presumption of law that the Vestal lode mining claim was located upon a vein which runs in the direction of the length of the claim, and that such vein crosses the two end-lines of that claim. No such vein, however, could, in its natural course, cross the line of the Group Tunnel. The northeast side-line of the Vestal claim is about 515 feet distant from the center-line of the tunnel, and the southwest side of the Vestal claim is about 800 feet distant from the center-line of the tunnel.

Any vein intersected in the tunnel would cross the course of the Vestal claim. We know, in fact, that the Jumbo No. 2 vein, which is the vein in controversy, does cross the north end of the Vestal claim, and that it is not the vein on any discovery of which the Vestal claim was located. When the Vestal claim made application for patent, the Jumbo No. 2 vein not having been discovered, no one could say that any vein would be cut in the Group Tunnel, which, in its course, southerly, would pass through or cross the Vestal claim. There was, therefore, no basis for an adverse claim, at the time when the Vestal applied for patent.

When the question involved is, as it is here, the right of *possession* of a *vein* claimed under the Tunnel Statute, with no controversy as to surface ownership, the law relating to adverses manifestly does not apply. The sole purpose of the adverse is to defeat or limit the patent of a mining claim. It primarily refers to rights as determined by surface boundaries. The adverse proceedings contemplate

surveys and plats, and description of the conflicting territory by reference to natural monuments or government corners. The successful party in the adverse suit, upon filing copy of the judgment roll, may obtain patent for his portion, upon paying $5 *per acre* for the land awarded to him. (Revised Statutes, Section 2326.)

None of these proceedings apply to rights of the nature claimed by the tunnel locator, when those rights rest upon his tunnel location alone. He cannot defeat the patent, because he, the tunnel locator, has no surface rights, nor rights to any vein, except such as he may thereafter discover in his tunnel. The applicant for patent for the lode claim would, so far as the tunnel claimant is concerned, be entitled to the surface and to all veins apexing within it, subject only to the tunnel locator's right to the possession of such particular vein as he should find crossing his tunnel, and which was not known to exist at the time he commenced his tunnel.

The tunnel owner, prior to discovery of a vein in his tunnel, cannot assert or prove, in Court or elsewhere, a right to the possession of any vein claimed by the applicant for the lode patent. The "unknown" and the "undiscovered" are not subjects of proof; and yet, when a vein is discovered in the tunnel, the right of possession takes effect as of the date of the tunnel location.

It is a familiar rule, in grants of rights in the public mineral domain, that a given grant is subject to any valid prior right of others, and this is true, whether the prior right be expressly mentioned in

the patent itself or not. It is the law and not the patent that fixes the rights of the parties. The patent cannot impose limitations which the law does not create; neither can it grant rights in excess of those which the law confers.

Though a claim be patented to one, yet another who owns a vein, having its apex outside of such patented claim, may follow such vein on its dip, into and under the surface of the patented claim. The patent for a placer claim does not convey an included lode, known to exist at the time of the application for the placer patent, unless it be specifically mentioned in the application; and this is true, although no words of exclusion are used in the placer patent. A patent based on the location of a particular vein does not prevent the owner of a cross-vein from following the latter through the patented territory.

See—

Hall vs. Equator Mining Co., Morrison's Mining Rights, (3d. Ed.), 382.
Branagan vs. Dulaney, 8 Colo., 408, 412.
Lee vs. Stahl, 9 Colo., 208, 210.
Morgenson vs. Middlesex Min., Etc., Co., 11 Colo., 176, 179.

In strict accord with the principles which rule in the foregoing illustrations, if some one other than a tunnel owner should make a location and obtain patent for a lode mining claim within 1,500 feet of the line of a previously located tunnel, such lode mining claim, even though patented, must be subject to the rights which the law gives the tunnel lo-

cator on blind veins which had not been discovered at the date of the tunnel location.

In none of the cases above cited by way of illustration would an adverse be necessary. It never has been and could not logically be claimed that the owner of the apex of a vein must adverse an application for patent on adjoining ground, in order to maintain his right to possession of his vein on its dip within such adjoining ground. His right to such possession exists by virtue of his ownership of the apex; and so the tunnel locator's right of possession exists by virtue of his prior tunnel location. In both cases, if patents issue for adjacent ground, these patents do not exclude the tunnel owner's right of possession, but are subject to those rights.

Our contention on this subject is in accord with the view, both of the Land Department and of the courts:

"When the *surface rights* of two claims do not conflict, the possibility of the future union of the two lodes embraced therein should not delay the sale of the land included in the respective claims, nor suspend an application for patent indefinitely to await development. The adjoining land is sold subject to the right of the first locator or patentee to follow his vein or lode thereunder, and the second claimant may be enjoined from taking the ore or minerals from such vein or lode." (Syllabus.)

Chollar, Potosi & Bullion vs. Julia, Copp's U. S. Min. Lands, 93, 97.

See also *Sickel's Mining Laws and Decisions*, 252, 254.

"Conflicting rights set up to defeat an application for patent cannot be recognized in the absence of an alleged *surface* conflict." (Syllabus.)

6 Land Decisions, 318.

This Court has substantially announced the same rule.

"By Section 2326, 'where an adverse claim is filed during the period of publication, it shall be upon oath of the person or persons making the same, and shall show the nature, boundaries and extent of such adverse claim,' etc. In this case there was no conflict between different locators of the same land, and no contest with regard to *boundaries or extent of claim*, such as seem to be contemplated in these provisions. Turner did not claim a prior location of the same lode, and made no objection to the boundaries or extent of Sawyer's claim, but asserted that he had acquired Sawyer's title by legal proceedings. The propriety of such claim was not a question which seems to have been contemplated in requiring the 'adversing of hostile claims.'"

Turner vs. Sawyer, 150 U. S., 578, 587.

The right which is given to the tunnel locator is a right to blind veins, a right to veins not previously known to exist, a right to undiscovered veins; and this right dates from the time of the location of the tunnel.

The Court of Appeals, in deciding this case, very justly said:

"The law does not require an impossibility of any man. It does not require him to know the unknown, or to demonstrate that which is incapable of

proof, and we are of the opinion that the owners of this tunnel ought not to be and were not estopped from enforcing the rights guaranteed to them by the act of Congress, because they did not make and maintain their claims to those rights at a time when it was impossible for them to establish them, and when no one knew that they existed. In our opinion Sections 6 and 7 of the Act of May 10, 1872, have no application to cases of this character, in which the existence of the adverse claim is unknown and incapable of fair adjudication until after the land is entered for patent; and we think the owners of the Vestal claim took their patent subject to the right of the owners of the tunnel to the possession of any unknown veins in that claim subsequently discovered in the tunnel just as they took it, subject to the right of the owner of an adjoining mining claim who never made any adverse claim to their location, to follow on its dip through their patented territory any vein which has its apex in his claim, and just as they took it subject to the right of a junior locator of a cross-vein, who had made no adverse claim to remove from the territory covered by their patent the ore in that vein not within the space of intersection. (Printed Record, p. 241.)

VI.

The fact that Jumbo No. 2 vein was discovered at a point in the tunnel which was within the vertical boundary lines of the Hiawatha lode mining claim does not defeat the tunnel owner's right of possession of Jumbo No. 2 vein to the full extent of 1,500 feet.

It was claimed by the appellee, in the Circuit Court of Appeals, that the existence of the Hiawatha lode mining claim across the line of the

Group Tunnel, prior to the discovery of the Jumbo No. 2 vein, prevented the tunnel owner from asserting a right of possession to the vein in controversy.

This is a very singular contention, in view of the plain language of the statute. The statute under which the tunnel claimant asserts his rights expressly gives to the diligent tunnel owner "the right of possession of *all veins or lodes* within three thousand feet from the face of such tunnel, on the line thereof."

Let us assume a case most favorable to the appellee, and it would be that in the prosecution of the tunnel a vein called the Hiawatha had been intersected, and that thereupon the Hiawatha lode mining claim was located thereon, in the position which that claim now occupies in relation to the tunnel; afterwards, driving the tunnel further into the mountain, the Jumbo No. 2 vein was discovered within the territory that had thus been appropriated for the Hiawatha claim; the said Jumbo No. 2 vein, however, running nearly parallel with the Hiawatha, but in such a way that it would cross the Hiawatha side-lines, as located: Does the fact that the Hiawatha location has been made defeat the right to also claim the Jumbo vein, when the statute expressly gives to the tunnel owner the right to all veins that shall be cut upon the line of his tunnel? The question answers itself.

But the appellee, in discussing this case, makes certain assumption of fact which are entirely unwarranted by the record. It is, for example, assumed that the Hiawatha lode mining claim was

located prior to the location of the Group tunnel and that, therefore, the discovery of the Jumbo No. 2 vein within the located boundaries of the Hiawatha was a discovery upon previously appropriated territory.

There is nothing in this record, that justifies the statement that the Hiawatha had been discovered or located prior to the location and commencement of the Group Tunnel.

Again, it is claimed on the part of the appellee that the appellant in this case, now the owner of the Group Tunnel, and now the owner of the Hiawatha lode mining claim, was the applicant for patent for the Hiawatha claim. There is, however, absolutely nothing in this record to justify this assertion. It is true that the Enterprise Mining Company, the appellant, has become the purchaser of both the Group Tunnel site and of the Hiawatha lode mining claim, purchasing the same through different channels and by divers *mesne* conveyances from the original locators of the several properties. The whole argument of the appellee upon this subject is based upon assumptions of fact which are not warranted by the record.

We respectfully submit that the only logical construction of the act of Congress defining the rights of those who locate and prosecute tunnels for the discovery of mineral veins, is that the right dates from the time of location and commencement of the tunnel; that the tunnel owner has the right of possession of 1,500 feet on any blind vein cut by his tunnel which had not been discovered or known

to exist prior to the location and commencement of his tunnel; that this 1,500 feet may be taken, in such proportions, on the one side or the other of the tunnel, as the tunnel owner shall prefer; that no duty rests upon the tunnel owner to adverse the application for patent, made by a party whose location is outside of the line of the tunnel, when such application precedes the date of the discovery of the vein in the tunnel; and that all locations made within a distance of 1,500 feet on either side of the line of the tunnel, after the commencement of the tunnel, are subject to the right of the tunnel owner to follow for the distance of 1,500 feet from his tunnel, into or through such locations, a vein discovered by him in his tunnel, which was unknown and undiscovered when his tunnel was located.

The opinion of the trial court in this case (53 Fed., R. 321) indicated a belief upon the part of that Court that the Congressional legislation could not have been intended to be of so generous a nature as to vest in a tunnel owner superior rights to such metal-bearing veins as he might discover in the prosecution of his tunnel through a tract of the public domain, embracing about two hundred acres; and appellee's counsel have assumed to fear that the rights granted by the "tunnel" provisions of the Congressional Act might be abused by some tunnel owner through the performance of some "lazy and perfunctory work twice in the year."

But nowhere in the record in this case is it pretended that the appellant, The Enterprise Mining

Company, or its grantors, were "lazy," or that their labors were "perfunctory."

On the contrary, the best of faith and the greatest diligence are conceded. The provisions of Section 2323 were calculated, and were doubtless intended, to induce great enterprises for the production of the precious metals—enterprises involving years of patient industry and the expenditure of great sums, before any possible reward could be expected.

The record shows that it was not till the end of five years of continuous labor by the appellant and its grantors and not until many thousand dollars had been expended, that The Enterprise Mining Company reached the goal toward which it had steadily progressed, relying upon and induced by the Congressional promise that it was entitled to and should possess such veins as might be discovered in its tunnel.

And we submit that, at the end of its labors, appellant ought not to be deprived of the fruits of its industry, nor, through a forced construction of the statute, be told that the laws upon which it relied could not have been intended to confer the rights which they clearly seemed to promise.

If appellee considers the Congressional enactment too liberal or too generous; if it fears that it may, in some instance, be abused; if Congress has failed to provide for the establishment of such regulations as will effectually prevent any possible abuse of the privileges conferred, the cure does not lie through any species of "judicial legislation," but through the amendment of the laws.

We respectfully contend that the decision and opinion of the United States Circuit Court of Appeals for the Eighth Circuit should be affirmed.

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HENRY M. TELLER,
of Counsel.

MARCH, 1897.

167-108

167-108

IN

THE SUPREME COURT

OF THE

UNITED STATES.

Office Supreme Court, U. S.
FILED.
APR 8 1897
JAMES H. McKENNEY,
CLERK.

THE ENTERPRISE MINING COMPANY,
Appellant,
v.
THE RICO-ASPEN CONSOLIDATED MINING COMPANY, *et al,*
Appellees.

No. 600.

BRIEF AND ARGUMENT OF THE RICO-ASPEN COMPANY.

R. S. MORRISON.

C. J. KELLY, Printer, Denver.

UNITED STATES OF AMERICA, ss.

IN THE SUPREME COURT

THE ENTERPRISE MINING COMPANY
v.
THE RICO-ASPEN CONSOLIDATED MINING COMPANY.

CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

ARGUMENT FOR THE RICO-ASPEN COMPANY.

The Rico-Aspen Company was the original complainant and obtained a decree in its favor before the Circuit Court at Denver, Colorado.

On appeal to the Circuit Court of Appeals this decree was reversed, whereupon the appellee, on petition, was allowed to sue out writ of *certiorari*.

The original bill of complaint was for an injunction to restrain trespass by the defendant company on the mine of the complainant, known as the Vestal lode. The bill made the usual allegation

of mining trespass, with the addition of averment of the attempted blowing up of complainant's works.

The Vestal lode was entered for patent August 1, 1892, upon a discovery made in 1879, as averred in the complaint (*Record, folio 2*).

September 3, 1892, a preliminary injunction was allowed.

By their answer, filed September 20, 1892, the defendant company plead title to the Jumbo No. 2 lode, and averred a location of the Group Tunnel site in these words:

"* * * That thereupon and immediately thereafter said Newman and his said locators began the actual work of excavating said tunnel, and at the same time marked out and established the line of said tunnel site and tunnel by causing the same to be surveyed in a straight line for a distance of 3,000 feet from the said face of said tunnel where said notice was posted, and caused such line to be plainly marked and established for said distance upon the surface of the earth by posts firmly set in the ground at intervals of about one hundred feet, and by marking said posts so that the same plainly showed them to mark the line of said tunnel site and tunnel; and thereupon the said Newman and his co-locators caused a duplicate of said certificate of their location of said tunnel to be duly recorded in the office of the county clerk of said county, with the sworn statements of said locators thereto attached, in which was set out, among other things, the name of said tunnel, the date of the commencement of the actual work of excavation thereof, the date on which the same was located, and the intention of the locators thereof to prosecute the same for the purpose of prospecting for, discovering and working all lodes, veins, ledges and deposits of minerals along the line of said tunnel, and in which was also set out the amount expended up to that time in running said tunnel," (*Record, folio 28.*)

This is followed by averments that the tunnel was started and work diligently prosecuted, and that at the time of such tunnel location no lode was known to exist on or crossing the line of said Group Tunnel, and especially not within the lines of the Vestal Survey Lot, now claimed by complainant.

Defendant also avers (*folio 29.*) that the Vestal was located by one A. E. Arms, in 1888, and that at the date of such location no lode had been discovered within its lines, and also that at that time the tunnel had been prosecuted "several hundred feet."

Avers purchase of the Group Tunnel Site by the Enterprise company, and that it had the right to all undiscovered veins within 3,000 feet from mouth of tunnel "to the same extent as if discovered from the surface and for a distance of 1,500 feet along such veins or lodes," (*folio 31.*)

That on June 15, 1892, at a distance of 1,920 feet from face of tunnel and more than 300 feet below the surface, it discovered a blind lode which it located as the Jumbo No. 2.

That upon locating, it claimed for the Jumbo No. 2 location 34 feet N. 54° 30′ E., and 1,446 feet running S. 54° 30′ W. from the point where struck in the tunnel.

(It is this 1,446 feet which overlaps for several hundred feet the Vestal patent.)

That at the time of the entry of the Vestal for patent the Group Tunnel had not been run to a point nearer than 800 feet from that part of the Vestal nearest to the line of tunnel.

Each party filed affidavits in support of their

respective allegations, and upon hearing on the bill, answer, replication and affidavits, the judgment of the Court below was that the complainant was entitled to a perpetual injunction.

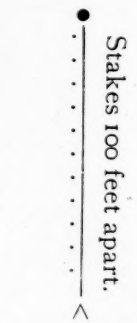
The above is a sufficiently full statement of the case to make clear the position of the original Court and of the appellate Court now on *certiorari* to this Court. In other words, we do not need to go into any controverted matters of fact to understand the distinctly legal points expressed by the Circuit Court of Appeals, which this Court is now asked to reverse.

The first material point is:

1. What is the effect of the tunnel location made, as in this instance, to segregate any part of the public domain, except its line proper, for the use of the tunnel?

The ordinary location of a tunnel site made under the Act of Congress, as construed by the Land Office, presents the following diagram:

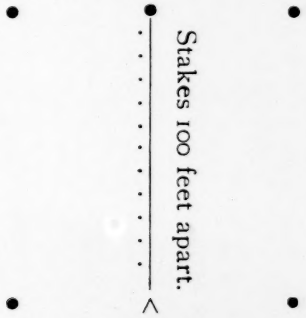
DIAGRAM "A."



Where the parties have not been content with the Land Office construction of what is meant by the "line of tunnel," the locations made have presented the same diagram, with the addition of posts set 750 feet to the right and left of the line proper, or with more than 750 feet on one side and less than 750 feet on the other side, so as to claim in all a specified and defined number of feet not exceeding 1,500 feet, as per the following diagram:

DIAGRAM "B."

3,000 feet.



Tunnel Mouth and Notice.

In instances, especially where there have been statutes attempting to limit the rights of a tunnel to a less number of feet than 1,500, the location has been staked off claiming 250 or 300 feet, as the case might be.

In the *Glacier case*, 127 U. S. 472, it was 250 feet on each side.

In the *Hope case*, 28 Pac. 73, it was 300 feet on each side.

In the *Bodie case*, 8 L. O. 173, it was 750 feet on each side.

The Group Tunnel location now in controversy was made under the original Land Office construction and gives no corner stakes or notice of claim to undiscovered lodes to any specific number of feet on either side.

It is a fairly formal and probably valid location or segregation of its line proper from the public domain and no more—even if upon a properly located claim it might have been entitled to segregate a width of 1,500 feet.

It was made under the then accepted construction of the Tunnel Act, in conformity to Land Office Rules 20-26, and in its record claims only a line staked lengthwise by posts, at varying intervals, for the length of 3,000 feet, and as to width says nothing. In addition to giving certain bearings and the distance from post to post of the stakes along its line, its only words of further claim are the introductory words, "claim by right of location a tunnel claim known as the Group Tunnel site for the purpose of discovering and working veins, lodes or deposits on the line thereof."

It can not even be told whether it is located under the Act of Congress of 1872 or under the Territorial Act of 1861, which allowed each tunnel 250 feet on each side along any vein cut in the tunnel.

It is true that the notice posted at tunnel mouth claims 1,500 feet on "all lodes, ledges or mineral deposits along the line thereof that shall be discovered or intersected by this tunnel or any

cross-cut therefrom," but it does not segregate that 1,500 feet, nor are there any stakes to indicate their bounds, nor does it *carry the notice into its record.*

"The location must be distinctly marked on the ground, so that its boundaries can be readily traced," and a description by which it can be identified. (R. S., Sec. 2324.)

We claim, therefore, that both by the form of its record and its staking it is precluded from claiming anything more than its line proper, even if upon a proper record and staking it could have laid claim to a parallelogram, or to all veins within a parallelogram of 3,000 feet lengthwise with the tunnel and 1,500 feet across.

2. The cotemporaneous construction of the Tunnel Section was correct; or, if doubtful, should largely determine present construction.

But at the outstart we maintain that the line of tunnel contemplated by the Act of Congress means only its line proper.

The Tunnel Section was passed May 10, 1872. Although tunnels were not new and District Rules or Territorial Legislatures had attempted to give them a limited number of feet on veins which they might discover, such a thing as their being made a pre-emption of full-length claims was never heard of; but it was at once seen that under a possible construction of this Act there might be a pre-emption of 1,500 feet in width across the bore or proposed bore of the tunnel, which produced a universal protest from all the mining camps on the Pacific slope.

This protest took form in the shape of a letter from Hon. Jerome B. Chaffee to the Land Office,

dated September 13, 1872, which on September 20, 1872, produced the official letter of Willis Drummond, Commissioner of the General Land Office, "that the line of the tunnel is held to be the width thereof and no more."

This letter was printed as part of the official rulings of the department, 1872, page 60.

But before this letter and as early as June 10, 1872, by their circular of that date, known as the official Land Office Rules, the Department had already adopted the same construction.

These rules have continued without change on this point now for twenty-five years. In these rules the line of the tunnel is required to be determined by stakes, notice and record. They call specifically for a line and allow of no extra-lateral rights to such line.

Subsequently and in various cases the point came up for consideration in the Land Office and they have invariably held in accordance with their original construction that the line of the tunnel meant the width of it and no more.

1876—*Corning T. Co. v. Pell*, 3 L. O. 130.
1878—*In re John Hunter*, 5 L. O. 34.
1878—*In re David Hunter*, 5 L. O. 130.
1882—*Bodie T. Co. v. Bechtel M. Co.* 8 L. O. 173.

The Land Office construction was followed by the case of *Corning T. Co. v. Pell*, decided in 1878, 5 Colo. 507. There the Court decide in terms that the line of the tunnel means the width of the tunnel and refer to any other construction as against the policy of the government.

The word line means also what the Land Office

construes it. It has length but not breadth or thickness. It was allowed breadth to the extent of the width of the tunnel, and this construction carves out either an easement or exception to title granted across it, sufficient to give it ownership of its trackway and upwards to surface, which was all it needed to fix its rights as a tunnel site, and on this line the location of claims was prohibited.

There are no other words used in the statute to broaden the word "line." The words "line of tunnel" have an exact meaning familiar to every miner as well as to every mining lawyer. There is an absolute grant of this line of tunnel and of the veins within such line, so that the tunnel has beneficial use of such veins on its line for connecting shafts and air courses, which gives it all title and conveniences essential for use and value as a tunnel. It then has a qualified grant to the extra-lateral veins dependent on discovery.

"A cotemporaneous construction * * gives the sense of the community as to the terms made use of by the Legislature."

Sutherland Statutes, Sec. 307.

"It settles ambiguities and ripens into established law."

Hahn v. U. S. 107, U. S. 406.
U. S. v. Pugh, 99 U. S., 269.

The point of my argument thus far is that the line of the tunnel means its line proper and no more: that if when properly asserted it might be more, the Group Tunnel by its location has confined itself to the line of tunnel proper—even if the Court hold that by a proper location it could have claimed extra-lateral rights.

3. The Group Tunnel location has not defined its 1,500 feet by notice or staking, and so cannot hold more than 750 feet on each side as determined by the Boara case.

The Circuit Court of Appeals held that a tunnel owner who prosecutes a tunnel with diligence, was entitled upon cutting a lode in his tunnel to 1,500 feet in either direction as against intervening locators.

This we claim to be opposed to the principle decided by the Federal Supreme Court in *Erhardt v. Boaro*, 113 U. S. 527.

If the Court had allowed the tunnel owner 750 feet each way, the point would not be controlled by that case.

Erhardt, a prospector, had just found a lode on which he had the right to claim 1,500 feet in any direction. He had posted his notice claiming his 1,500 feet, but not specifying in what direction. The Court ruled that he could prevent location 750 feet in either direction, but not to the extent of 1,500 feet in either direction.

The law gave him the right at the moment of discovery to claim 1,500 feet, but he could not prevent others prospecting within a radius of 3,000 feet. If he failed to designate on which side or sides he would locate his 1,500 feet, the law would limit him to the presumption that he claimed his discovery as his center.

Exactly analagous is the case at bar, conceding, for the purposes of this argument, to the tunnel absolutely the same right as to a surface discoverer.

The Tunnel Notice (*Record, folio 269*) claims the right to 1,500 feet on all undiscovered lodes. Erhardt, the discoverer, in the case before the Federal Supreme Court, had the same notice.

HAWK LODE.

"We, the undersigned, claim 1,500 feet on this mineral-bearing lode, vein or deposit.

"Dated June 17, 1880.

"JOEL B. ERHARDT, 4-5ths.

"THOMAS CARROLL, 1-5th."

GROUP TUNNEL SITE.

"*Know All Men by These Presents,* That the undersigned hereby locate and claim this tunnel site, beginning at this point and running S. 57°, E. for a distance of 3,000 ft., and the right of possession of 1,500 ft. in length and 300 ft. in width of all veins, lodes, ledges or mineral deposits along the line thereof that shall be discovered or intersected by this tunnel or any cross-cut therefrom. Size of tunnel, 4 ft. by 6½ high.

"CHARLES NEWMAN,

"W. L. STEPHENS,

"MATTHEW T. CHESTNUT."

Either one might have claimed 1,500 feet east or 1,500 feet west, if the notice had designated the direction. Not having done so, neither could bar prospecting for double the distance over which his claim could be finally extended.

In the case covered by this review the Vestal lode was patented more than 750 feet west of the tunnel. At the same time other lodes were located east of the tunnel. As the decision stands the tunnel owner, upon cutting the vein, could demand from either, that he had priority of title, against either the five or six patented claims shown within a radius of 1,500 feet east, or against a like number within 1,500 feet west.

The Court in quoting the Colorado statute say it allows to a tunnel discovery the same rights as a surface discovery. If that be true it can not have any greater. Its rights, if any, to lodes, are limited by its record, and by its notice at tunnel mouth. That tunnel notice could specify on which side it claims the 1,500 feet. Not having done so it comes within the express and authoritative ruling of the *Boaro case*, that it is presumed to take such 1,500 feet equi-distant from its center point.

4. Whatever might have been the rights of the Group Tunnel, it was bound to adverse or to enjoin applications for patent for lodes extra-lateral to its line and within the radius on which it could have asserted title.

The record of the Vestal Lode on which the patent issued was made April 2, 1888. It was a relocation of a claim, originally recorded in 1879, which had been abandoned. Having applied for patent, it made final entry on June 30, 1890. The Group Tunnel was located in 1887, and was in some unknown distance when the final record of the Vestal was made.

But it was bound to adverse the Vestal, as it had the right to under the practice of the department. *In re Tioga M. Co. 8 Land Owner, 88; Bodie Co. v. Bechtel Co. Id. 173.*

Or it could stay by injunction the application for patent, as had been judicially decided. *Hope M. Co. v. Brown, 28 Pac. 732.*

Not having done so, by what law is it excepted from the effect of a patent?

The only possible answer to this is to say that the wording of Section 2,323 is an absolute grant

to the tunnel site of a vested estate in a piece of land 3,000 feet square not to be divested even by patent, to any portion of that piece of land. Certainly every surface location of a single claim has as broad a grant of all veins apexing within its lines. "Exclusive right of possession" is the language of Section 2,322, referring to such surface locations. But the same vein may be claimed by two surface locations, or by a surface location and a tunnel site. One such claim applies for patent and by statute the other must adverse or forever lose its priority. The application is a summons to all the world to assert rights against the issue of the patent or be forever barred. *Wolfley Co. v. Lebanon Co. 4 Colo., 112; Iron Silver Co. v. Campbell, 135 U. S. 299.*

The only exception of a case which need not adverse is, where two lodes unite as they go down, which the statute provides for in terms, saying that "the prior location shall take the vein below the point of union." That exception is not one which can be extended by analogy to any other case under the mining law.

We maintain that a tunnel location must protect these asserted extra-lateral rights, either by an adverse or by enjoining the patent proceedings until it has ascertained whether the lode about to be patented would be cut in the tunnel.

The Act says, Sec. 2,325, that every applicant for patent shall give notice of publication for sixty days, and:

"If no adverse claim shall have been filed with the register and receiver of the proper land office, at the expiration of the sixty days of publication,

it shall be assumed that the applicant *is entitled to a patent and that no adverse claim exists.*"

The Act of 1872, in one bill, codifies the entire mining law of the United States. All subsequent legislation refers to it and is in the form of amendments to it. The same Act provides for lode claims, placer claims, tunnel claims and millsite claims. Even a millsite has been decided in construction of the Act to be a mining claim. *Hartman v. Smith, 14 Pac. 648.* Provision is made for patenting each sort of claim. If either lode, millsite or placer applies for a patent any conflicting claim of any character must adverse to protect its rights. The language of the Act is sweeping. It uses the words "adverse claim" without limiting the term to any class of claims.

The entire theory of the Act is to ripen possessory or inchoate claims into the security of patented claims. Prior discoveries, equities of the strongest character, are lost by failure to adverse. If they are not wiped out the security of the patent amounts to nothing.

This application for a patent is a proceeding *in rem* and the patent is conclusive against all the world. *420 M. Co. v. Bullion Co., 3 Saw. 634; 11 Mining Rep. 609; Hamilton v. Southern Nevada Co. 33 Fed., 562; 15 M. R. 314.*

Of course, we assume that the Court will construe the Act as a whole. It will not say as to a location across the path of a tunnel it "*shall be invalid*" because the Act says so, and at the same time treat the words "*shall be assumed that the applicant is entitled to a patent*" as if they meant

nothing. Both provisions can be given full force by saying that a tunnel, like any other claim, must adverse to save its rights.

We assume the answer to this to be that the vein is yet a long way ahead and may never be cut. Is that hardship a reason to defeat the security of a patent? Two surface discoveries may be 1,400 feet apart, and that much drifting necessary to determine whether they are one—whether any real conflict exists—whether the senior record is in fact attacked by the junior record, but that hardship does not avail to save the senior lode from the effect of a patent to the junior, if the senior fail to adverse.

Besides, if a tunnel has this alleged inchoate right to a vein not yet cut, but is not in position to adverse, the Courts will intervene to protect the inchoate right of the tunnel.

In *Hope Co. v. Brown, 28 Pac. 732*, it was never even intimated that the tunnel could assert rights if ever a patent issued. That was a conceded point. Suit was there brought to stay the patent proceedings, because they would when perfected, have forever barred the tunnel's title. The case before this Honorable Bench is the first to intimate, after twenty-five years of mining litigation, that the inchoate right of a tunnel was not impaired by the patenting of a lode across its line.

The opinion complained of makes a patent void as against a secret equity arising out of a state of affairs existing *in pais*, and possibly wholly unknown to the purchasers of the patented title; and makes a general provision of a general act, applying over the entire public domain, to be a better

title than the specific grant by metes and bounds of a specific tract.

5. The Jumbo No. 2 lode was located within the patent lines of the Hiawatha lode, making such Jumbo location void under the authority of the Gwillim v. Donnellan case. Estoppel.

The point of discovery of the lode cut in the tunnel had been already located and patent applied for, without adverse, to the Hiawatha. This makes the decision complained of in opposition to the point decided by the U. S. Supreme Court in *Gwillim v. Donnellan, 115 U. S. 45.* The ruling in that case was that no location could be made on ground already located or patented. Even after location, if the locator allowed his discovery shaft to be patented to a third party, his entire location was destroyed.

The opinion complained of avoids this by saying that the Hiawatha location upon a surface discovery later than the tunnel location was void by the Act of Congress. The Act does not use the word "void." It says such location shall be "invalid." But the Act does not say that a patent issued upon such invalid location shall be either invalid or void. Nor does it prevent the operation of an estoppel where the originally invalid title is bought in by the holder of the hostile equity which made it invalid, and the invalidity has been waived by an election to affirm it by going to patent upon it.

The Hiawatha was the property of the owners of the Group Tunnel at the time when they made location of the same ground as the Jumbo No. 2

By their purchase of it they estopped themselves from treating it as public domain. They elected to apply for patent upon it as a surface discovery and location, thus barring themselves from the right to treat it as vacant ground. It being thus their own claim, they attempt to make a second location within their own lines, which the Federal Supreme Court says cannot be done, and which decision has been followed as the settled law. The exact point was decided in *Golden Terra Co. v. Mahler*, 4 Mining Rep. 390, that a second discovery could not be made within the lines of the locator's own prior claim.

Certainly, after they bought the Hiawatha title and affirmed it by asking for a patent, they cannot assert that either the location or the patent should contain an implied exception in favor of themselves as the owners of the Group Tunnel site. An exception of tunnel rights by which they could claim a second patent on the tunnel discovery as excepted out of their first location or patent on the Hiawatha surface discovery, would be one operating in their own favor, or, in other words, one carved out of a man's estate for his own benefit.

6. The Tunnel has in no event a claim to the Vestal vein as it was a known ore body discovered years before the date of the Group Tunnel location.

We assume that if a vein was known to exist, a vein with a visible outcrop or notoriously uncovered at various points in the immediate vicinity, a tunnel could assert no rights against it, without regard to the fact of whether it had been uncovered or showed itself immediately on the line of the

tunnel. The words of the Act are "not previously known to exist."

The Act excepts such veins whether visibly outcropping or discovered by the surface excavations of other parties.

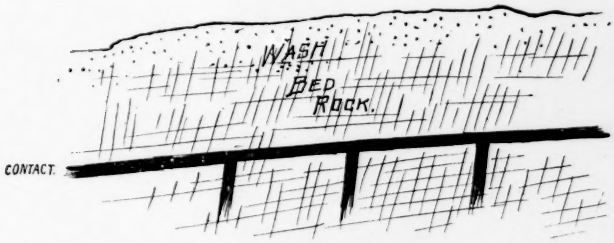
In the present instance the valuable deposit in controversy had been known ever since 1880, and notoriously since 1887, when it produced a State reputation to the district because it had resulted in a sale of over $1,000,000, and it was then, when this very Enterprise Company had become the purchaser of a large group of locations upon it—where its existence was an absolute certainty—that this tunnel was started not to discover but to reach the deposit. It now claims the equitable consideration which the law gives to the first inventor of a great machine or the first finder of a great mine.

As a discoverer of this contact it has no more right to priority than Galileo could assert as against Copernicus to the discovery of the true theory of the planetary system.

We repeat here the observation from our brief on motion for a *certiorari*.

"A tunnel has absolutely no equity. It is not a means of discovery. Mining value is always known in advance by the labor of the surface prospector. A tunnel is never driven into a hill until it is known not doubtfully but absolutely that mineral lies across the path of the tunnel."

The mineral formation of this hill is illustrated by the following diagram:



This contact has been known since 1880, though some of these dropping veins might not have been known. But the real value is in the contact, a great blanket vein and as subsidiary to it are the droppers which fall from its floor.

7. Extreme and unprecedented character of the claim to elect along a parallelogram of 3,000 feet square.

We desire to call attention to the extremity of the claims of this Tunnel Company. We refer to any of the large maps found in the Record or exhibited to the Court. They show various survey lots patented at various dates to the right and left of the tunnel. If the tunnel can await its cutting of the veins already patented before it attacks these patents, it can await how long? And how many years can it watch the immense cost of developing these properties before it makes its election to claim a vein 1,450 feet to the east or a vein 1,450 feet to the west? And would it not have the right to bargain between them and to demand from the east vein one-half its

value in consideration of its letting up on that side and attacking the vein on the other side?

If the tunnel can claim this parallelogram it amounts to a pre emption of over 200 acres, being equal to the area of more than twenty full-sized lode claims.

If the "Diligence" of the tunnel driving is estimated at one foot a day (and any court or jury in the mining country would call that reasonable diligence on a lease or contract), it amounts to a pre-emption in time for more than nine years of this entire tract.

A tunnel, as known when this act was passed, was a means of working a lode. By the name of cross-cut it was an appurtenance to almost every mine opened on hilly ground. It was a mere adit or opening to the vein. To sink costs infinitely more than to run a tunnel Why then in equity should 3,000 feet of driving across country have rights and values not given to an equal amount of sinking.

In sinking the miner can only expect to develop one lode. In cross-cutting he may discover and develop many. If the tunnel discovers new ground it should of right belong to its owner, but the fact that he is running horizontally instead of on the vertical gives the tunnel claimant no equitable reason to pre-empt the ground in front of him.

Until this act, and for many years after the act, the tunnel continued its useful and legitimate mode of existence—until the decision of this case in the Court of Appeals. It then at once assumed the proportions of a giant and the attitude of a black-mailer.

This decision is used in every camp to discourage and even in instances to prevent entirely the labor of the prospector in searching for and opening up surface discoveries.

The tunnel claimants seem to assume that they alone take risks and expend money. They overlook the fact that in the very case at bar, and in thousands of other instances, sinking through slide or barren rock has to be carried on for hundreds of feet before the lode or contact is reached. If the tunnel is to claim everything in its front, from its date of location, it would *take from the prospector, who had already sunk 300 feet of a shaft,* the contact lying below the shaft and in front of the tunnel, and give the vein to one who started to seek the vein by tunnel perhaps a year later than the date when the shaft was started.

For the Act says: "No location shall be made until after discovery, and that locations on the line of the tunnel shall be invalid."

Especially in such a district as Cripple Creek, which consists of a series of low rounded hills, tunnels have been taken up on each side of the hill, and as to what the rights of these tunnels are as against each other no man can know or foretell.

It is enough that under this Rico-Aspen decision the prospector has no right on the hill, nor within a quarter of a mile, and he is deprived of his business and his property by the construction placed by lawyers on the rights of the only class of miners, to wit: the prospectors and the surface miners, who have made the mining industry of the Pacific Slope the evenly distributed and democratic industry which it is.

There is in the opinion an intimation that to confine the tunnel line to the width of the tunnel is to give the tunnel no rights at all. On the contrary, there are many tunnels driven at great expense which are a profitable enterprise without claiming anything except by royalties from the claims they cut.

The real value of a large tunnel is that it controls the situation from an economic point of view. Under average conditions the value of a tunnel cutting a lode at 1,000 feet depth is greater than the value of the mine which it taps, and the contract stands between them in hundreds of instances that the work of mining is done through the tunnel at an agreed royalty for the carriage of ores The tunnel once run is absolutely without further expenses; the mine is a continual expense, and there can be little doubt of the general proposition that the net revenue to a tunnel would be greater than the profit to the owner of the mine.

Such tunnels often need an air connection to the surface. This may come through the mine it cuts or by working directly by upraise to surface. In any event they ought to own their line not as an easement, but in fee. Such is the intent of the Act of 1872, as introduced by mining men and construed by mining men, and as an afterthought, when the Chaffee letter and the Corning case had become a rule of property, that the threat was made to pre-empt at once every mountain of known mineral value, by locating a tunnel at its base.

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